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Chilean Accession to NAFTA: U.S. Failure and Chilean Success

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Chilean Accession to NAFTA: U.S. Failure and Chilean Success

Rafael X. Zahralddin-Aravena[†]

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I. Introduction

Chile should be the next country to be incorporated into the North American Free Trade Agreement (NAFTA) because of its

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impressive economic and democratic reforms. During the Summit of the Americas, held in late 1994, President Clinton announced that Chile would be the next nation to be invited into NAFTA, with all three current partners working towards Chilean accession.¹ Chile should have been granted NAFTA membership soon after the Summit of the Americas, but as of late 1997 nothing substantial has yet occurred with regard to Chilean accession.² Many in both the NAFTA member countries and in other Latin American countries are puzzled at the delay, especially considering that the United States has preached open trade and political liberalization for decades to its Latin American neighbors. Quite simply, it is the American political environment which is to blame for the delay in Chilean accession, not the actual merits of Chile's candidacy.

Some commentators believed that because of the "ordeal to obtain congressional approval of NAFTA," the Clinton administration was wary of repeating the process too soon,³

¹ See David E. Sanger, *Chile is Admitted a North American Free Trade Partner*, N.Y. TIMES, Dec. 12, 1994, at A8; Helene Cooper & Jose de Cordoba, *Chile is Invited to Join NAFTA as U.S. Pledges Free Trade Zone for Americas*, WALL ST. J., Dec. 12, 1994, at A3.

² Clinton's latest in a series of unfulfilled promises came in early August 1997 during a White House News Conference where he pledged to renew his bid for fast track negotiating authority. See Finlay Lewis, *Clinton, Administration Open Fast-Track Push*, Copley News Service, Aug. 6, 1997, available in LEXIS, News Library, Copnws File. U.S. Trade Representative ("USTR") Charlene Barshefsky indicated that in early September 1997, the White House would introduce fast track legislation geared to produce a consensus in the Republican controlled Congress. See *id.* Success in an agreement over the balanced budget may be tempered by the increasing contention between Vice President Al Gore and House Minority leader Richard Gephardt who are both vying for the next democratic presidential candidacy. See *id.*; *infra* notes 251-55 and accompanying text. The administration finally requested fast-track authority in late September 1997. See *infra* notes 262-64 and accompanying text.

³ SIDNEY WEINTRAUB, NAFTA WHAT COMES NEXT? 80 (1994). The Mexican Peso crisis also took its toll on the NAFTA effort. See *Rediscovering the Americas*, ECONOMIST, May 17, 1997, at 15 [hereinafter *Rediscovering*]. Many critics also demand more from NAFTA, which has been stigmatized by reports of job loss and very little job creation. See Paul Magnusson & Amy Broun, *Free Trade Was Supposed to be Easy*, BUS. WK., May 19, 1997, at 39. This is true despite reports that free trade has produced growth and "1 of 8 net new jobs between 1992 and 1996." *Id.*

A summer of 1997 administration report lauded NAFTA for its successes, though its picture was modest. See *An Honest Report Card on NAFTA*, CHI. TRIB., July 17, 1997,

especially with ardent opposition from strange bedfellows such as organized labor, environmental groups, consumer groups, Ross Perot, Pat Buchanan, and a good number of Democrats led by House Minority Leader Dick Gephardt.⁴ Up until the 1994 Republican victory in Congress, the Democratic leadership wanted a bilateral agreement with Chile.⁵ The Democratic leadership did not believe that NAFTA's side agreements on labor and the environment were strong enough and saw the bilateral agreement as a means to strengthen protection of U.S. environmental and trade standards.⁶

Congressional Republicans, however, have consistently sought to avoid environment and labor issues in trade agreements,⁷ equating such riders with "bureaucratic meddling in the market place."⁸ This political landscape, coupled with a lack of will in the Clinton administration, has stalled any advancement of Chile's case.

The following Article will first examine Chile's economic fitness as a NAFTA candidate. The Chilean case is especially informative because of the successes of Chile's free market ideology as well as its status as an economic model and example

sec. 1 at 20. The *Chicago Tribune*, in an editorial, chided the President for not defending the successes of the trade pact more aggressively. *See id.* The article also claimed that trade growth, investment and "accelerated" economic integration, as well as tremendous future economic potential, were all NAFTA successes. *See id.* USTR Barshefsky has noted that judging NAFTA on its first three years is short sighted, considering the pact was designed to be phased in over a 15 year period. *See* Christopher Marquis, *Small Gains by NAFTA May Hurt Expansion Chances in the Future*, FLA. TIMES-UNION, July 13, 1997, available in LEXIS, Market Library, Prompt File.

An independent study by DRI/McGraw Hill was far more praiseworthy, relating that NAFTA accounted for a positive impact of \$29.4 billion on the U.S. Gross Domestic Product. *See id.*; *see also The NAFTA Effect*, ECONOMIST, July 5, 1997, at 21 (assessing NAFTA and stating that political gains are far more significant than the modest economic gains for NAFTA); Sidney Weintraub, *In the Debate About NAFTA, Just the Facts Please*, WALL ST. J., June 20, 1997, at A19 (praising NAFTA gains, political and economic, and dispelling common myths about the trade pact).

⁴ *See* Morton Kondracke, *NAFTA Redux: Both Sides Gear Up for 'Fast Track' Fight*, ROLL CALL, July 17, 1997, available in LEXIS, News Library, Rollcl File.

⁵ *See* WEINTRAUB, *supra* note 3, at 96.

⁶ *See id.*

⁷ *See id.*

⁸ Lewis, *supra* note 2.

to its Latin American neighbors.⁹ Next, the Article will discuss Chile's evolving environmental regime and suggest that Chile should not be denied NAFTA accession for environmental reasons.¹⁰ The Chilean Constitution ensures the right to a clean environment¹¹ and Chile has taken bold regulatory steps to fulfill that constitutional guarantee.¹² The Chilean Supreme Court has also championed the environment, recently stopping a large forestry project.¹³ Next, the Article discusses the U.S. political battles over Chilean accession and suggests that U.S. politics, rather than any deficiency on Chile's part, has held up Chilean accession.¹⁴ Finally, this Article will propose an additional legal solution to any environmental obstacles to Chilean NAFTA accession which might remain.¹⁵

II. Chile's Economic and Political Environment

A. Chile's Free Market Miracle

Consistent with the principles of NAFTA, Chile's economic policy now rests firmly on the principle of free trade. The key to Chile's recent rapid and consistent growth has been free market reforms that have led the economy to be one of the most respected in Latin America.¹⁶ After years of following an import substitution model,¹⁷ Chile pioneered a free market model that emphasized

⁹ See *infra* notes 16-88 and accompanying text.

¹⁰ See *infra* notes 89-245 and accompanying text.

¹¹ See CHILE CONST. ch. III, art. 19(E).

¹² See discussion *infra* at notes 195-224.

¹³ See *infra* notes 162-68 and accompanying text.

¹⁴ See *infra* notes 246-82 and accompanying text.

¹⁵ See *infra* notes 283-84 and accompanying text.

¹⁶ See Deroy Murdock, *Bustling Chile Could be Rounding a Corner Today*, PLAIN DEALER (Cleveland), Dec. 11, 1993, at 7B.

¹⁷ A country's decision to follow an import substitution model flows from a distrust of exploitative foreign corporations and a desire to develop its own industries using protectionist methods. See Don Podesta & Steve Coll, *Chile Capitalizes on Copper Mining*, WASH. POST, Mar. 21, 1994, at A1. Natural resources were protected by the state, which recognized they were limited. See *id.* at A14. Import substitution was also seen as a compromise between "unfettered capitalism and Soviet style Bolshevism." *Id.*

strong export orientation. Many of the lessons learned in Chile were later applied in "Margaret Thatcher's Britain, the Czech Republic, Israel, South Korea, Portugal and Spain, to name a few

...¹⁸

Chile took as its model the export-based economic successes of post-war Germany and Italy.¹⁹ Recognizing that export-led growth can only be sustained during a period of economic stability, while inflation and exchange rate movements are under

The Chilean application of this model culminated with socialist President Salvador Allende's nationalization of many industries, notably its copper mines. *See id.* While the dictator, Pinochet, lowered tariffs and implemented many other free market reforms, neither his government nor successive democratic regimes have privatized the nationalized copper industry. *See id.* at A14-A15. The nationalized copper industry, Corporación Nacional del Cobre de Chile (CODELCO), is the largest in the world. *See id.* at A15. The Chilean government and CODELCO have worked out a compromise with foreign investors. The government allows the investors to pay for extraction rights and operate mines while the Chilean government continues to own CODELCO and minority positions in the foreign operated mines. *See id.* at A15.

¹⁸ William Gruber & Pat Widder, *A Returning Hero in Hyde Park; Milton Friedman Still Doesn't Think Much of the Fed, But Says Alan Greenspan 'Has Got it About Right,'* CHL. TRIB., May 15, 1997, at N1.

¹⁹ *See id.* The free market economic strategy was mostly associated with the neo-liberal economic philosophy of Milton Friedman of the University of Chicago. This and the fact that many of Pinochet's advisors were trained at the University of Chicago led to the naming of Pinochet's economic advisors as the "Chicago Boys." *See* Gary Becker, *Latin American owes a lot to its 'Chicago Boys',* BUS. WK., June 9, 1997, available in LEXIS, News Library, Buswk File; Paul Craig Roberts, *Welfare Doesn't Have to be Habit-Forming—Just Look at Chile,* BUS. WK., July 28, 1997, available in LEXIS, News Library, Buswk File; Gruber & Widder, *supra* note 18, at N10; *see also*, Henry Ma, *Dear Editors Xeres Letter Draws a Dissenting View,* BUS. WORLD, July 22, 1997, available in LEXIS, Market Library, Prompt File (discussing the fact that there was at least one woman in the Pinochet advisors and that Columbia and Harvard were also represented). This commentator recommends *Pinochet's Economists* by Juan Gabriel Valdés as a good source for material on the Chicago Boys. *See id.*

One commentator relates the following, quoting José Pinera, ex-Pinochet economic advisor:

I would have preferred to work under a democratic government . . . but we cannot choose our historic times . . . I had to make the most difficult decision of my life and abandon an academic career that I loved . . . I sensed a call of duty. I had a Ph.d in economics and had to go back to my country.

Peronet Despeignes, *Economist José Pinera,* INV. BUS. DAILY, Mar. 27, 1997, available in LEXIS, News Library, Invldly File. Chile's success and influence on reforms in the region bears out his decision. *See* Becker, *supra*.

control,²⁰ Chile has succeeded in controlling its exchange rate, holding the currency to a level that ensures international competitiveness.²¹

Chile's inflation has similarly been kept in check by tight fiscal management, so that Chile has not needed to rely on privatization to balance its accounts.²² In addition, the Aylwin government successfully predicted inflation rates.²³ The Frei's regime has preserved the vitality of the economy, sustaining "high savings and investment, low inflation and a stable exchange rate."²⁴

Economic and political stability provided by the Aylwin administration facilitated the economic transition from Third World country to Newly Industrialized Country (NIC). The successive transition and democratic governments in Chile maintained free market policies, increasing the level of investment in health and education while working harder to create more jobs.²⁵ Ex-Finance Minister Alejandro Foxley and Frei economic advisor Juan Villarzú have both made statements indicating the democratic regime's intentions to take development in Chile to the next level.²⁶

²⁰ See Victoria Griffith, *Taking Top Honors*, LATINFINANCE, Oct. 1992, at 19.

²¹ See *id.*

²² See *id.* As one government official relates: "'The difference between Chile and other countries is that Chile started privatization with some surplus in its budget,' points out Joaquin Vial Ruiz-Tagle, coordinator for economic policy at the Ministry of Finance." *Id.*

²³ See *id.*

²⁴ *More of the Same from Frei: Irela Makes Predictions for the Second Half of His Term*, LATIN AM. WKLY. REP., July 29, 1997, available in LEXIS, News Library, Txtnws File [hereinafter *Frei*].

²⁵ See *id.* at 52. "These increases are as measured by the United Nations Economic Commission for Latin America, from 40% to 33% of the 13.3 [million] population between 1990 and 1992." *Id.* As reported by *Business Week*, a 1996 IMF report detailed Chile's increased investment in public expenditures in health, education, housing and some family allowances and pensions. See Gene Koretz, *Chile Boosts Social Outlays*, BUS. WK., Nov. 18, 1996, at 34.

²⁶ See Paul Mylrea, *President Frei Says Democracy Permanent in Chile*, Reuters, Dec. 12, 1993, available in LEXIS, News Library, Txtnws File. One commentator, quoting ex-Finance Minister Alejandro Foxley, relates the following: "In Latin America, you can't modernize the economy without at the same time taking a priority decision to reduce inequalities, cut unemployment and make an effort to invest in people . . . I am

Chile's extremely vigorous economy has made it the most prosperous country in Latin America.²⁷ The World Economic Forum in Switzerland dubbed Chile "the fifth-most competitive newly industrialized power," following Singapore, Hong Kong, Taiwan and Malaysia.²⁸ Chile's sophisticated financial markets have led investment consultants to describe Chile as the "old tiger" of the Latin American capital markets.²⁹ Others claim that Chile represents "an Asian economy in the heart of Latin America."³⁰

Chile's economy has grown at a rate of eight percent a year since 1990, a rate which, if maintained, would give Chile the living standards of Spain within ten years.³¹ With its strong economic growth, Chile has invested in "electronic utilities, railroads, supermarkets, pension funds, pharmaceutical firms, textile plants and telephone systems . . ." in other Latin American countries.³² Investment by Chile in neighboring economies

surprised by the results, because they went further and were better than I ever expected" Paul Mylrea, *Chile, Its Economy Business Report*, Reuter European, Dec. 2, 1993, available in LEXIS, News Library, Arcnws File. Juan Villarzu, Frei's economic adviser, added: "We've set a target of eliminating extreme poverty in Chile by the year 2000, We believe it's possible that by the middle of the first decade of the next century for Chile . . . to be a developed country in terms of income per head." *Id.*

²⁷ See Diego Ribadeneira, *Warming Trend for US, Latins; Critics Say Only Rich and Middle Class Benefit While Poor Are Out in the Cold*, B. GLOBE, Dec. 27, 1993, at 20. Commentators are generally laudatory in their description of the new Chile:

It doesn't take long after landing at Santiago's international airport to discover that Chile is unlike the rest of Latin America. Instead of the usual favelas and slums, tidy pre-fabricated houses line the city's outermost streets. The center of town is spotless and even the elevator operators are well dressed. "We often think of ourselves as an island in Latin America," said one investment banker. Inside the colonial government buildings and the glass and steel highrises, Chileans break with Latin tradition by showing up on time for appointments and exhibiting an unusual concern for coming up with accurate statistics and numbers. Even the highest government officials show an almost puritanical taste for modesty and self-effacement.

Griffith, *supra* note 20, at 19.

²⁸ Murdock, *supra* note 16.

²⁹ David Pilling, *Keeping an Eye on the Old Tiger—The Emerging Investor*, FIN. TIMES, Nov. 29, 1993, at 24, available in LEXIS, Busfin Library, Fintme File.

³⁰ *Id.*

³¹ See James Brooke, *With a View of One Hemisphere, Latin America is Freeing It's Own Trade*, N.Y. TIMES, Dec. 29, 1993, at D2.

³² Calvin Sims, *Chilean Ostentation Piques Its Neighbors*, INT'L HERALD & TRIB.,

currently exceeds eight billion dollars.³³

As a result of its success, Chile was recently admitted to the Asian Pacific Economic Cooperation Trade Group (APEC).³⁴ In addition, Chile became "the first Latin American country to be awarded a formal investment-grade credit rating," when Standard & Poor's gave the country's sovereign debt an implied BBB rating, which designated Chile as a safe investment.³⁵ In July 1995 the rating was upgraded to an A-.³⁶

Chile has effectively avoided the debt problems of its neighbors. One commentator noted that the Latin America debt crisis of the 1980s demolished many Latin "world class companies . . . and, in its wake, left the image of backward institutions and failed governments."³⁷ However, this commentator distinguished the Chilean experience, noting that Chile retained its "robust economy . . . and sophisticated people and institutions" in spite of the crisis.³⁸

Chile also led the way in the resurrection of the Latin American corporate image after the debt crisis of the 1980s. *Compañía de Teléfonos de Chile* was the first Latin American company to list American Depositary Receipts (ADRs) on the New York Stock Exchange, raising 100 million dollars in an oversubscribed offering.³⁹

Nov. 18, 1996, at 1.

³³ See *id.*

³⁴ See *Mexico: Is Accorded Membership in Asia-Pacific Trade Group*, LATINFINANCE, Dec. 1993 at 6 [hereinafter *Asia-Pacific*]. At the APEC summit in Seattle, Washington, on the same day that Mexico was formerly admitted, the group announced the admittance of Chile in 1994. See *id.*; *Philippines, Australia Urged to Go Slow in Pushing Democracy*, AGENCE FRANCE PRESSE, Oct. 12, 1997, available in LEXIS, News Library, AFP File.

³⁵ *Long Overdue*, LATINFINANCE, Oct. 1992, at 33, available in LEXIS, News Library, Latfn File.

³⁶ See Arturo C. Porzecanski, *Chile, Is Chile Still a Model for Latin America?* LATIN AM. L. & BUS. REP., Aug. 31, 1997, available in LEXIS, News Library, Cumws File.

³⁷ Samuel R. Young, Jr., *Recognizing Vital Signs*, LATINFINANCE, May 1993, at 30.

³⁸ *Id.*

³⁹ See *id.* Mexico would follow in 1990, when Teléfonos de Mexico, the Mexican phone monopoly, "was sold to private investors for US \$1.76 billion, making it the

In light of the liberalization of its economy, access to NAFTA would provide substantial economic benefits to Chile. Chilean NAFTA negotiator Juan Gabriel Valdés has given three main reasons accession to NAFTA is important for his country.⁴⁰ First, NAFTA provides insurance against protectionism by the developed world.⁴¹ Second, access to the North American market, which has a Gross Domestic Product 200 times that of Chile, is essential to Chile's export-based growth.⁴² Third, Chile has found that its value-added products are at a disadvantage, especially in the agricultural sector, because the United States protects these products at home.⁴³

B. Comparisons to Mexican Accession

Economists rightly believe that Chile has a good chance of negotiating NAFTA accession.⁴⁴ Mexico, for one, would not stand in the way. Mexican businesses would welcome Chile into NAFTA because the present Mexico-Chile Free Trade Agreement (FTA)⁴⁵ contains no dispute settlement system.⁴⁶ From Mexico's point of view, Chile should meet existing NAFTA requirements

largest privatization ever for Latin America." *Id.*

⁴⁰ See Timothy O'Leary, *Chilean Official says NAFTA is Insurance Against Future Trade Curbs*, INSIDE NAFTA, Mar. 8, 1995, at 8 [hereinafter *Insurance*].

⁴¹ See *id.*

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See Victoria Griffith, *Positioning for Pacts: Latin Nations Vie for NAFTA-like Agreements*, LATINFINANCE, Dec. 1993, at 35, available in 1993 WL 12254438 [hereinafter Griffith, *Positioning*].

⁴⁵ Chile already has a free trade agreement with Mexico and has recently completed a free trade agreement with Canada which will take effect on June 2, 1997. See John Urquhart, *Chile Negotiates Pact with Canada on Route to NAFTA*, WALL ST. J., Nov. 15, 1996, at A18 (discussing Chile-Canada FTA); see also *infra* note 77-78 and accompanying text (discussing Chile-Mexico FTA).

⁴⁶ See COECE Official Raises Possibility that Side Accords Could be Dropped, INSIDE NAFTA, Dec. 28, 1994, at 3 [hereinafter COECE]. Only the Mexican Business Council on Foreign Trade (COECE), an influential private sector advisory group, has indicated that the side agreements could be dropped from the requirements to accession, while stressing that the organization has not taken a stance on the matter. See *id.* The head of COECE, Juan Gallardo, indicated that the Summit for the Americas had made clear that the accords had been construed to "foster enormous collaboration support and technological exchange" that would not disappear if the accords were removed. *Id.*

because any changes to those requirements would be to Mexico's detriment.⁴⁷ At a minimum, Mexico wishes for the Chile-Mexico FTA to "form the core of the NAFTA extension."⁴⁸

Furthermore, some analysts believe that Chilean NAFTA accession should be easier than Mexican inclusion into the trade agreement between the United States and Canada.⁴⁹ Chile would never suffer from anything like Mexico's peso crisis, which necessitated a U.S. government bailout, because Chilean growth is based on exports while the economic boom in Mexico was based on loans.⁵⁰

The fear of jobs flowing out of the United States into Chile is reduced as well, because of the relative distance between Chile and the United States. In contrast to Mexico, the costs of exporting goods from Chile to the United States is too high to justify relocating any significant American industries to Chile.⁵¹

Chile also has a longer history of democracy than Mexico and has achieved a smooth transition back to a democratic government after a military reign of seventeen years.⁵² Prior to the overthrow of

⁴⁷ See *Pretty Slow; It Talks*, Latin Am. Reg. Reps.: Mex. and Central America, Aug. 24, 1995, available in LEXIS, News Library, Txtnws File.

⁴⁸ *Id.*

⁴⁹ See Griffith, *Positioning*, *supra* note 44, at 35.

⁵⁰ See Marco Antonio Sibaja, *Crisis Stirs Concern Over Regional Economic Model*, Inter Press Service, Jan. 5, 1995, at 1, available in LEXIS, Market Library, Prompt File. Foreign aid was non-existent because Chile was shunned for human rights violations during its military regime. See Shirley Christian, *The America's: Don't Let Mexico's Woes Spoil Our Commitments to Chile*, WALL ST. J., Feb. 3, 1995 at A13.

⁵¹ See Griffith, *Positioning*, *supra* note 44, at 35.

⁵² Pinochet allowed an October 1988 plebiscite, which he lost. See Brad Risinger, *A Chilling Look at Latin American Violence*, RECORDER, Dec. 5, 1991, available in LEXIS, News Library, Recror File. Chile officially ceased to be a dictatorship on March 11, 1990 with the election of President Patricio Aylwin. See Jean A. Briggs, *A Political Miracle*, FORBES, May 11, 1992, at 108; Robert J. Quinn, *Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model*, 62 FORDHAM L. REV. 905, 914-15 (1994). The second free elections placed President Eduardo Frei, a Christian Democrat, into office. See *id.* at 55 n.10.

During his first term, Frei made repeated attempts at constitutional reform which may bear fruit during his second term in office. See *Frei*, *supra* note 24. "The once prevailing fear of a possible return to authoritarian rule has now largely been dissipated," which has emboldened the democratic coalition to more freely challenge many policies left over from the dictatorship, such as the designated senators. *Id.* The

Chilean democracy in 1973, Chile could boast of 150 years of civilian democratic rule.⁵³ Mexico's democracy, however, is still flawed, as is evident from the Zapatista rebellion, claims of human rights violations, and the PRI's one party hold over the country.⁵⁴

*C. U.S. Failure in Chilean Accession is the Seed for
Protectionist Revival*

Rejecting Chile's bid for accession after its successes would send a very strong message of American insincerity to other Latin American countries, which view Chile as a model. The United States already has to tread lightly in Latin America because of its trade policies concerning drugs, immigration and Cuba—policies that have been the target of united Latin American criticism.⁵⁵

Latin countries have decided that protectionism could enhance their bargaining position with the United States.⁵⁶ Regional trade blocs are now accused of diverting trade and encouraging protectionism.⁵⁷ Brazil has been an especially outspoken foil on

removal of the policy of appointing senators, a remnant of the past dictatorship, will be proposed officially by Frei in March 1998. *See id.*

⁵³ *See* DAVID HOJMAN, CHILE, THE POLITICAL ECONOMY OF DEVELOPMENT & DEMOCRACY IN THE 1990S 6 (1993). Chile is often described as the "oldest and firmest democracy in Latin America," because of its multiparty politics and full panoply of civil and political rights. MARK FALCOFF, MODERN CHILE 1970-1989: A CRITICAL HISTORY 1 (1989). Prior to the 1973 coup, there was a brief dictatorship by Colonel Carlos Ibanez del Campo, surviving only four years. *See id.* at 5. This episode, and the social and economic problems caused by it, convinced many in the military to "never again . . . surrender the prestige of their institutions to the intrigues of civilian politicians." *Id.* at 269. Aside from the Ibanez del Campo dictatorship, in which a democratic uprising chased the dictator from the country, civilian government existed for 150 years until the 1973 coup. *See HOJMAN, supra*, at 8.

⁵⁴ *See* Monica Serrano, *The Army Marches Without a Map; Transition to Democracy Alters the Military's Traditionally Insular Role and its Relationship to Civilian Authority*, L.A. TIMES, Aug. 4, 1997, at B5; Roberto Rodriguez, *Mexico's Election Merely Plants a Seed of Democracy*, STAR TRIB., July 21, 1997, at 9A, available in LEXIS, Market Library, Prompt File; Alfredo Corchado & Laurence Iliff, *Mexico in Transition; Growing Popular Movement Assails Political Structure*, ORANGE COUNTY REG. (California), May 26, 1997, at 1A, available in LEXIS, News Library, Ocreg File.

⁵⁵ *See Rediscovering, supra* note 3, at 15.

⁵⁶ *See* Sebastian Edwards, *NAFTA Offers Latins Little They Can't Have Now*, WALL ST. J., Apr. 18, 1997, at A19 [hereinafter *NAFTA Offers*].

⁵⁷ *See id.*

trade issues⁵⁸ and the strengthening of the Mercosur—a Latin American trade pact whose membership includes Brazil, Argentina, Paraguay and Uruguay⁵⁹—may come at the expense of the U.S.-orchestrated NAFTA. According to other Mercosur members, Brazil has made a “turn toward protectionism” because of its limits on import financing within that trade group.⁶⁰ Colombia’s rise in import tariffs, protectionism in Venezuela and Ecuador, and import controls in Mexico and Argentina all mark a trend that portends a stall in liberalization.⁶¹ Perhaps these problems would not have evolved in this manner had the United States followed through on its homily of liberalization.

Within the United States, protectionism seems to pervade the opposition to Chilean accession as well. Most of the U.S. sectors opposing Chilean accession, such as the fruit growers, complain about tariff and non-tariff barriers, such as sanitary and phytosanitary measures,⁶² which can be negotiated during the

⁵⁸ See *Rediscovering*, *supra* note 3 at 15; see also *The Mirage that Won't Go Away*, *ECONOMIST*, May 10, 1997, at 42, available in LEXIS, News Library, Econ File (discussing Mercosur’s alternate approach to negotiation of a Free Trade Area of the Americas by 2005).

⁵⁹ See *Proceed with Caution*, *LATINFINANCE*, Oct. 1992, at 22 [hereinafter *Proceed*].

⁶⁰ See *NAFTA Offers*, *supra* note 36, at A19.

⁶¹ See *id.*

⁶² See *Mexico, Chile Come Under Attack from U.S. Industry in NTE Comments*, *INSIDE NAFTA*, Nov. 16, 1994, at 5 [hereinafter *Attack*]. Chile had allowed only American lemons and kiwis into the country and was on the verge of an agreement as to apples and pears in early 1995. See *Chile U.S. Have 'Major Differences on Fruit,' U.S. Official Says*, *INSIDE NAFTA*, Jan. 11, 1995, at 12. The entry of grapes was also being considered. See *id.* U.S. fruit growers have indicated that they view the Chilean market as small, but wish to position themselves for Argentina and to serve niche markets in Chile. See *id.*

A fall 1994 GAO report indicated that U.S. problems with Chilean sanitary and phytosanitary measures on fruits, poultry meat, and fish eggs were generally based on legitimate concerns. See *GAO Study Highlights Chilean SPS Measures that Curb U.S. Exports*, *INSIDE NAFTA*, Oct. 19, 1994, at 6 [hereinafter *GAO Study*].

There has been an administrative delay in establishing rules for apples, avocados, blackberries, blueberries, raspberries, strawberries, other citrus fruits, pears, and stone fruit. See *id.* There were no entry rules before 1991. See *id.* The Chilean government was cited by the California Avocado Commission for its delay in reviewing entry of California Avocados into Chile. See *Attack*, *supra*, at 5. Additional complaints were discussed against Chile in regard to quotas for table grapes. See *id.*

NAFTA discussions. Some analysts predict that U.S. fruit growers and wine makers might challenge Chilean accession because Chile exports about one half of its total \$1 billion of fruit each year to the United States.⁶³ Opposition from fruit growers, including the California Peach Advisory Board, may also be forthcoming because of Chile's growing value-added agricultural industry that imports products, such as canned peaches, that will compete with U.S. value-added agricultural products.⁶⁴ The competition between Chilean and American fruits, however, may be lessened somewhat because of the nations' different growing seasons.⁶⁵

Even the protest by the indigenous Chilean Mapuche Indians contains elements of protectionism.⁶⁶ The Mapuche oppose NAFTA accession because they claim it will result in the destruction of bio-diversity, misuse of natural resources on their lands, and because it will severely affect them as they are producers of wheat and corn.⁶⁷ Private sector and government sources say that when the tariffs drop to zero, wheat producers will be significantly affected.⁶⁸

The zero tolerance for salmonella was also cited by the report as "unduly restrictive and a non-tariff trade barrier." *GAO Study, supra*, at 6. The tolerance was not based upon scientific principles, because there are over 2,400 strains of salmonella carried by animals and humans and only two severely affect chicken flocks. *See id.* This restriction was seen as a response to the USDA not allowing Chilean poultry processing plants to be a source for U.S. imports. *See id.* U.S. fish growers also charge that the Chilean live salmonid egg import regulations are also discriminatory and exceed international standards. *See id.* Another problem was the lack of transparency in Chilean government for setting sanitary and phytosanitary regulations. *See id.* The distilled spirits council says Chile's laws are "antiquated." *See Attack, supra*, at 5. Whiskey is taxed at 70% of the duty paid, other spirits at 30%, and domestic pisco at 25%. *See id.*

⁶³ *See* Griffith, *Positioning*, *supra* note 44, at 13.

⁶⁴ *See Fruit Industry Groups May Come Out Against Chile's entry into NAFTA*, INSIDE NAFTA, Dec. 28, 1994, at 4; *see also* Paul Levy, *Chile is Red Hot*, WALL ST. J., Apr. 14, 1997, at A13 (discussing the increased interest in and growth of the Chilean wine industry); Susan Postlewaite, *Salmon Imports Take Leap but Florida's \$150 Million Dollar Business is Jeopardized by Accusations that Chile is Improperly Driving Down the Domestic Cost of Fish*, BROWARD DAILY BUS. REV., Nov. 8, 1996, available in LEXIS, Busfin Library, Fllaw File.

⁶⁵ *See* Griffith, *Positioning*, *supra* note 44, at 13.

⁶⁶ *See Indigenous Group in Chile to Visit U.S. to Oppose NAFTA Accession*, INSIDE NAFTA, Jan. 11, 1995, at 14.

⁶⁷ *See id.*

⁶⁸ *See id.*

D. Other Criticisms of Chile's Accession Unfounded

Other opponents and critics of Chilean accession fail to fully take into account Chile's less intangible economic strengths. One commentator argued that Chile is a weak NAFTA candidate for three main reasons: First, Chile is not a major trading partner for the United States, ranking thirty-third;⁶⁹ Second, the absence of border issues such as customs problems, migration, and cross-border pollution make trade agreements less pressing;⁷⁰ Third, the United States does not gain a "platform" from which to enter other Latin American markets because Chile is not part of another regional trade pact.⁷¹ Additionally, this commentator believes that the bilateral route would be counterproductive because layer upon layer of separate bilateral agreements on top of NAFTA would be inefficient and costly for the United States.⁷²

This and other critics to Chile's accession bid have misapprehended and underestimated Chile's true strengths. First, Chile's strengths do not lie in its copper fields or vineyards, but in its well developed government and financial institutions.⁷³ Although Chile is not an economic powerhouse with the potential of China's market or the natural resources of Brazil or Argentina, Chile's positive accomplishments and leadership role in the process of Latin American liberalization should be more important to the United States than strict quantitative evaluations of the Chilean GDP.

Furthermore, many Latin American countries admire and envy Mexico's inclusion in NAFTA and are striving to accomplish the same objective.⁷⁴ These countries also admire the Chilean model of economic and political liberalization. Chile marched at the forefront of the liberalization revolution by returning to a policy of

⁶⁹ See WEINTRAUB, *supra* note 3, at 80.

⁷⁰ See *id.*

⁷¹ See *id.* This commentator does agree, however, that Chile would be a good model because of its political and economic achievements and that the conditions established on Chile's inclusion will act as a precedent for other entrants. See *id.* at 95-98.

⁷² See *id.*

⁷³ See *supra* notes 16-43 and accompanying text.

⁷⁴ See Griffith, *Positioning*, *supra* note 44, at 35.

unilateral tariff reduction.⁷⁵ Tariff rates should drop to seven percent in 1997.⁷⁶

Chile also led the trend toward the creation of Latin American free trade pacts. One commentator relates: "Andean Pact, the Group of Three, Mercosur and various Chilean agreements[] now cover nearly all of South America."⁷⁷ Between 1990 and 1993, Chile signed free-trade pacts with Argentina, Bolivia, Colombia, Mexico, and Venezuela.⁷⁸

Delay in an agreement with the United States caused Chile to begin looking far beyond Latin America for trade partners. In recent years, Chile has signed agreements with Canada,⁷⁹ the

⁷⁵ See Edwards, *supra* note 56, at A19.

⁷⁶ See *id.*

⁷⁷ *Id.* Chile began reconsidering Mercosur after the delay in NAFTA negotiations. See *Chile First but Columbia and Venezuela Closing; Group of Three on Verge of Deal*, LAT. AM. REG. REPS.: MEXICO & NAFTA REP., Dec. 2, 1993, at 2, available in LEXIS, Nsamer Library, Lan File [hereinafter *Chile First*]. The Chileans, however, have avoided the Andean Pact because Chilean free-market reforms are far more advanced than those made by the pact's members (Bolivia, Colombia, Ecuador, Peru, and Venezuela). See *Peru, Government Edges Out of Andean Pact as Deficits Widen*, LAGNIAPPE LETTER, May 16, 1997, available in 1997 WL 9452948 (discussing Chile's withdrawal in the 1970s and Peru's decision to leave to find better trade opportunities in Mercosur and with Mexico); *Andean Pact Continues Regional Integration Process*, LA-C BUS. BULL., Oct. 1, 1995, available in 1995 WL 8607958 (discussing Chile's withdrawal in 1976 and the protectionist policies of the Andean Pact in the 1970s and 1980s). The Chileans also earlier declined an invitation to join the Mercosur pact. See *Next Step Chile*, LATINFINANCE, June 1992, at 10; Liane L. Heggy, *Free Trade Meets U.S. Farm Policy: Life After Uruguay Round*, 25 L. & POL'Y INT'L BUS. 1367, 1401, n.97 (1994). The Mercosur Pact includes Argentina, Brazil, Paraguay, and Uruguay. See *Chile/U.S. Bilateral Free-Trade Pact?* LATINFINANCE, June 1992, at 10. Chile hesitated to join the Mercosur trade block until 1994. Chile joined as an associate member because Chilean tariff levels were already lower than Mercosur levels. See *Chile Says it Wants to Become Associate Member of Mercosur*, BBC Summary of World Broadcasts, June 14, 1994, available in LEXIS, News Library, Txtnws File. Chile has an 11% tariff across the board for all countries, while Mercosur has higher rates which vary by product. See *id.*; see also Ana Maria Anguinis, *The Future of Free Trade in the Americas: Can Mercosur Accede to NAFTA? A legal Perspective*, 10 CONN. J. INT'L L. 597 (1995) (concluding that there are no legal obstacles to a Mercosur accession, though other obstacles do exist).

⁷⁸ See Brooke, *supra* note 31, at D2.

⁷⁹ See Urquhart, *supra* note 45, at A18; Anthony DePalma, *Canada Forges Trade Pact with Chile*, INT'L HERALD TRIB., Nov. 20, 1996, at 17.

European Union,⁸⁰ and APEC.⁸¹

Although Chile is a relatively small trading partner for the United States, its position as a leader in South American

⁸⁰ See *EU/Chile: Chile Hopes for Extensive Cooperation Accord with EU*, EUR. REP., Feb. 18, available in 1995 WL 8356806. This report states the following:

Chile hopes to begin negotiations shortly on an improved Cooperation Agreement with the European Union. The fact that Chile is currently considering some form of membership of two different trade blocs in the Americas is not an obstacle to closer ties with the EU, Chilean Deputy Foreign Minister Mariano Fernandez said on February 17

Chile's concept of regional integration differs somewhat from that of its neighbors. Rather than joining one particular trade bloc—Mercosur, the Andean Pact, the North American Free Trade Association (NAFTA), the Asia-Pacific Economic Cooperation forum (APEC)—it has so far maintained a strategy of seeking seek Free Trade Agreements with all its major partners, including the EU.

The Government in Santiago is currently negotiating some form of membership with both NAFTA and Mercosur (the Southern Cone Common Market).

Id. Contrary to this report, Chile is a member of APEC. See *Asia-Pacific*, *supra* note 34, at 6.

⁸¹ See *Clinton to Meet ASEAN Lenders Over Currency Turmoil*, AGENCE FRANCE-PRESSE, Nov. 12, 1997, available in 1997 WL 13432280. Accession to NAFTA has become somewhat less of an "urgency" because of the trade ties that have been forged across the globe. See Paul Blustein, *Chile Makes a Soft Pitch for NAFTA Membership*, INT'L HERALD TRIB., Feb. 28, 1997, at 17; Jonathan Friedland, *Chile is Relaxed on NAFTA as Chief Begins U.S. Visit*, WALL ST. J., Feb. 24, 1997, at A18. Chile has even argued that the failure of NAFTA would not be a "disaster." See *Chile First*, *supra* note 77, at 2. One commentator theorizes that the failure of NAFTA would cause the Latin American countries to come together and move towards an eventual SAFTA (South American Free Trade Area). See *id.* The Inter-American Bank echoed this sentiment at the Summit of the Americas by stating that integration in the hemisphere would best be achieved through many trade blocs that would eventually come together as a single entity. See *Hemispheric Free Trade Targeted*, CARIBBEAN UPDATE, Jan. 1995, at 1, available in LEXIS, Market Library, Iacnws File. The report relates:

The easiest path towards hemispheric free trade will be for countries to team up in regional blocs, and for these to later merge into the FTAA, says Enrique Iglesias, head of the Inter-American Development Bank. Some of this has already occurred. In addition to NAFTA (which links the U.S., Canada and Mexico, and will soon include Chile), there are[] Mercosur (joining Argentina, Bolivia and Paraguay); Andean Group (made up of Bolivia, Colombia, Ecuador, Peru and Venezuela); the Central American Common Market; Caricom (comprising 12 English-speaking Caribbean countries); and the Group of Three (Colombia, Mexico and Venezuela).

Id.

economics makes it a very important market for all NAFTA members. In spite of its absence from NAFTA, foreign investment by Canada, Mexico, and United States (\$1.5 billion, \$24 million, and \$4.54 billion respectively) accounted for over half of the total 1994 investment in Chile.⁸²

Second, the driving force behind trade liberalization should be found in broader issues of development and the strengthening of markets in the Americas, not the narrow resolution of border problems. It is absurd that Chile should be penalized because it does not have border problems with the United States.

Third, although many Latin American countries have trade pacts with Mexico, they can not export goods into the United States under the pacts because of NAFTA's country of origin clause.⁸³ This clause would equally bind the United States if it wished to trade with a member of another free trade group. If the United States wanted to gain the benefit of free trade with the members of a trade group it would need to negotiate with the trade group itself.

Accession into NAFTA would be the next logical step in the Chilean economic plan.⁸⁴ In any event, Chile hopes to become "an

⁸² See *Chile, Talks are Planned to Sketch Blueprint for NAFTA Entry*, LAGNIAPPE LETTER, Jan. 10, 1995, at 1, available in LEXIS, Market Library, Iacnws File [hereinafter *Blueprint*].

⁸³ See North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., art. 401, 32 I.L.M. 605 (1993) [hereinafter NAFTA]; *Blueprint*, *supra* note 82.

⁸⁴ See *Blueprint*, *supra* note 82. Chile, as a country of only 14 million, needs an open trade policy, especially with the government's emphasis on export, equalling one third of total production, a far cry from only 12% two decades ago. See Griffith, *supra* note 20, at 29. In accordance with Chilean export based economy, Chilean tariff rates are the lowest in Latin America. See *id.* The Chilean economy centers on traditional commodities, mining, and agriculture. Leading the economic expansion are "[i]ndustries that develop and exploit the abundant natural resources of Chile—mining, agriculture, fishing and forestry . . ." Lawrence J. Jensen, *Environmental Regulation in Latin America: A Rapidly Changing Legal Framework*, NAT. RESOURCES & ENV'T, Fall 1993, at 23; Griffith, *supra* note 20, at 19.

The country is longer than the U.S. is wide, but averages only 100 miles in width. See *id.* Its land mass is approximately the size of Texas. See MERWIN L. BOHAN & MORTON POMERERANZ, INVESTMENTS IN CHILE 7 (1960). It counts nitrate, copper, lumber, coal, and a fertile agricultural base amongst its natural resources. See LIBERT EHRMAN, OPPORTUNITIES FOR INVESTMENT IN CHILE 1 (1966). Nitrate was particularly important to the international market at one time because, aside from its use as a

export platform for the region,"⁸⁵ not because it is part of a trade grouping, but rather because its trade regime is extremely advanced and attracts trade.⁸⁶ Entering into another FTA or NAFTA accession would give a clear policy direction for Chile's private sector.⁸⁷ After all, Chilean officials remark that they are not seeking strategic alliances with the EU, NAFTA, Mercosur, and APEC because they are in economic trouble, but because they are in the best position politically and economically that they have been in years.⁸⁸

III. Environmental Concerns

Chile should not be denied admission to NAFTA because of environmental concerns. Chile has made great strides in formulating a comprehensive framework to protect the environment. The NAFTA side agreement contains demanding environmental requirements. Chile understands that its membership in NAFTA hinges on its ability to create a cogent, enforceable environmental regime consistent with the side agreement.

A. Chilean Preparation for the NAFTA Side Agreement

1. NAFTA and the Side Agreement

Concern for the environment figures prominently in NAFTA.

fertilizer, it was a key element in the production of explosives. See MARK FALCOFF, MODERN CHILE 1970-1989, A CRITICAL HISTORY 3 (1989). Also, the Pacific Ocean's Humboldt Current provides the country with fish and shellfish resources. See EHRMAN, *supra*, at 1, 8.

Some commentators note that a weakness of relying on mining and agriculture is that the country is too dependent on copper, which accounts for over a third of the country's foreign exchange income. See Griffith, *supra* note 20, at 19. The country has plans to diversify, but for the moment is building upon its success in agriculture and other commodities. See *id.* Chile is moving rapidly into value-added industries, including very competitive food processing, wine, and furniture industries. See *id.*; Griffith, *supra* note 20, at 19. Another Chilean weakness is that Chile also needs to upgrade its transportation infrastructure, including roads and ports, an essential factor in an export-based economy. See *id.*

⁸⁵ *Proceed*, *supra* note 59, at 22.

⁸⁶ See *id.*

⁸⁷ See *Insurance*, *supra* note 40, at 8.

⁸⁸ See *id.*

The three member states of NAFTA, Canada, Mexico, and the United States, agreed to the North American Agreement on Environmental Cooperation (side agreement) in September 1993.⁸⁹ The side agreement became effective along with NAFTA on January 1, 1994.⁹⁰

The NAFTA preamble itself contains an express recognition of environmental concerns.⁹¹ In the preamble, the parties agree to engage in trade liberalization that will not ignore the possible consequences to the environment.⁹² NAFTA declares that trade relations will be in "a manner consistent with environmental protection and conservation," and that "sustainable development" is an important goal of the treaty.⁹³

The preamble links trade and the environment in a structural and strategic manner. Under NAFTA, trade issues are no longer to be resolved in a vacuum, free from environmental considerations. The parties agree to plan trade and investment with environmental consequences in mind, including the coordination of environmental regulations and a harmonization of environmental laws.

Under NAFTA, a complaining nation has the burden of proof for any challenge of an environmental or health measure.⁹⁴ GATT/WTO procedures, in contrast, require that any party defending a domestic sanitary or phytosanitary measure prove that the measure is not arbitrary, is not a disguised barrier to trade, or does not unjustifiably discriminate against foreign products.⁹⁵

The dispute settlement panel⁹⁶ or a disputing party can also

⁸⁹ See *Implications of International Environmental Agreements Between the United States and Mexico*, BNA INT'L ENV'T DAILY, Apr. 18, 1994, available in LEXIS, Envirn Library, Bnaied File [hereinafter *Implications*].

⁹⁰ See *id.*

⁹¹ See NAFTA, *supra* note 83, pmbl.

⁹² *Id.*

⁹³ See *id.*

⁹⁴ See *id.* art. 723(6).

⁹⁵ See General Agreement on Tariffs and Trade, art. XX, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 188 [hereinafter GATT].

⁹⁶ The dispute settlement process in NAFTA has three steps. First, formal consultation, which allows each party the right to prompt consultation on any matter

request a written report from "independent experts," usually non-governmental groups or other scientific experts.⁹⁷ This is the first time a trade agreement allows trade experts to call upon this type of input and experience. The settlement panel would then be required to take the report into account when releasing its own published report.⁹⁸

Finally, environmental issues that arise under chapters 7 or 9 of NAFTA, relating to mandatory trade provisions or specified environmental or conservation agreements, can be forced into NAFTA resolution.⁹⁹ Normally, the member bringing the challenge can go to the NAFTA forum or a GATT forum, but if the matter is environmental, the defending member might be able force it into the "greener" NAFTA process.

NAFTA also mandates that parties live up to independent environmental agreements.¹⁰⁰ NAFTA enumerates "three environmental agreements whose trade obligations take precedence" over any inconsistent NAFTA provision.¹⁰¹ Moreover, the parties "can agree to add environmental agreements" in addition to those listed.¹⁰²

The side agreement deals specifically with enforcement and the effectiveness of environmental protection that already exists in the United States. The agreement "has established a Commission for Environmental Cooperation whose responsibilities include facilitating [the side agreement's] dispute-resolution process,"

affecting the members NAFTA rights. *See* NAFTA, *supra* note 83, art. 2006(1). If consultation fails within 45 days, any member can call the three parties together for a Free Trade Commission meeting, where they will choose appropriate dispute resolution. *See id.* art. 2007 (1)(b)(4),(5). If this fails then an arbitral board may be called, which will present a report to the Commission which must publish it within 15 days. *See id.* art. 2017(3). Then the parties make a final decision usually consistent with the board's recommendation. *See id.* arts. 2008 (1), 2016 (2).

⁹⁷ *See id.* arts. 2014, 2015.

⁹⁸ *See id.* art. 2015.

⁹⁹ *See id.* arts. 2003-2020.

¹⁰⁰ *See Implications, supra* note 89.

¹⁰¹ *Id.* These are the Montreal Protocol on Substances that Deplete the Ozone Layer, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. *See id.*

¹⁰² *Id.*

which includes trade sanctions, to deal with enforcement.¹⁰³ The Commission on Environmental Cooperation was also created to prepare an environmental protection record of the NAFTA nations.¹⁰⁴

The dispute resolution process has been criticized as unwieldy and ineffective:

First, the dispute-resolution process is long and complex. The process could take several months and as long as three years if a country refuses to enforce its environmental laws and the panel is forced to resort to sanctions.

Second, its enforcement provisions may be seldom used since two of the three parties to the agreement must provide their consent before the dispute process can even begin.

Third, it may be difficult to gather sufficient evidence of a persistent pattern of failure by a party to effectively enforce its environmental laws since the commission's investigative powers under the side agreement are weak.¹⁰⁵

While these criticisms may have some validity, the overall effect of the side agreement is far from weak. The side agreement encourages stronger domestic environmental regulations in compliance with the agreement.¹⁰⁶ The side agreement is not primarily concerned with trade sanctions. It is rather "a framework to promote cooperation and teamwork among governments—cooperation on conservation and protection and enhancement of the North American environment."¹⁰⁷

¹⁰³ Armin Rosencranz et al., *The Necessity Defense*, RECORDER, July 8, 1994, at 13, available in LEXIS, News Library, Recrdr File.

¹⁰⁴ See *North American Nations Ratify NAFTA*, 12 ENV'T WATCH LATIN AM. 1060, Dec. 1993, available in LEXIS, Market Library, lacnws File [hereinafter *Ratify*].

¹⁰⁵ *Id.*

¹⁰⁶ See Rosencranz et al., *supra* note 103, at 13.

¹⁰⁷ *NAFTA: The World's First Green Treaty Environmentally Sound Trade*, BUS. MEX., Jan.-Feb. 1994, at 51, available in LEXIS, Busfin Library, Abi File. The agreement contains the following objectives:

1. Establishment of sovereign environmental-protection laws by each country, combined with a high degree of protection and compliance contained within the document;
2. Commitment to transparent procedures that are fair, equitable and open;
3. Creation of the trilateral Commission for Environmental Cooperation . . .

While not a central concern of the side agreement, trade sanctions are still available. A member state that exhibits "a persistent pattern of failure to effectively enforce its environmental law' may be subject to a monetary penalty and even a suspension of NAFTA benefits if it continues neglecting its enforcement obligations."¹⁰⁸ Companies found violating the environmental agreement and that fail to comply with the recommended corrections after a stipulated time period can have monetary fines of \$20 million imposed.¹⁰⁹

2. *History of Chile's Treatment of its Environment*

Until the recent past, Chilean policy was dominated by an exploitationist viewpoint, which was characterized by a desire to maximize productivity at the expense of the environment.¹¹⁰ Chile

[headquartered in Canada] to handle public inquiry, consider sanctions and oversee conservation efforts ;

4. Formation of a council led by the three environmental ministers: [Secretary Carol Browner of the U.S. Environmental Protection Agency (EPA), Secretary Carlos Rojas of Mexico's Secretariat of Social Development (SEDESOL), and Canada's Deputy Prime Minister and Minister of the Environment, the Honorable Shella Copps.] They will deal with the public's "right to know," transboundary environmental damage, natural resource accounting methods and policy guidelines. The Council is charged to meet at least once annually and to have public sessions within these meetings;

5. Formation of a secretariat in support of the CEC to be its operational body and to be led by an executive director with a trinational staff;

6. Formation, under this secretariat, of a Joint Public Advisory Commission comprised of 5 non-governmental members from each country who will oversee provisions for dispute resolution and enforce compliance; and,

7. Complaints lodged with the CEC will be reviewed by Joint Public Advisory Commission, which in turn will make recommendations [to the appropriate government].

Id.

¹⁰⁸ *Id.*

¹⁰⁹ *See id.*

¹¹⁰ *See* Joseph G. Block & Andrew R. Herrup, *Symposium: NAFTA at Age One: The Environment Side Agreement: Addressing Environmental Concerns Regarding Chilean Accession to NAFTA*, 10 CONN. J. INT'L L. 221, 256-57 (1995); Karin Ranta, *Balancing Hardrock Mining and the Environment: The Chilean Model*, 6 COLO. J. INT'L ENV'T L. & POL'Y 423, 429-30 (1995); Andrew Herrup, *Chile's Place at the NAFTA Table*, LEGAL TIMES, Dec. 9, 1986, at 23.

did have environmental legislation as early as 1912,¹¹¹ but it lacked coordination, had overlapping authority, and had ambiguous jurisdictions. At one time, Chile had hundreds of different environmental statutory provisions and regulations, which in 1992 were condensed into one reference volume.¹¹² Chile was never plagued, as was Mexico, by lax enforcement. Chile's successive governments have all had one consistent similarity: a devotion to maintaining law and order,¹¹³ but the environmental regime was onerous and somewhat confusing.

Recently, Chile has made great strides towards a safer, cleaner environment. Legislation has been drafted to mandate the use of natural gas in industry and land vehicles.¹¹⁴ As a result of these measures, lead free gas arrived in Santiago as did more emissions checks and inspections in 1992; all vehicles built after 1992 were required to have catalytic converters.¹¹⁵ In June of 1994, twenty-one ecological buses, the first of many, began their routes in Santiago.¹¹⁶ One of the busiest ports in Chile, Talcahuano, has been declared an emergency zone and a model clean-up plan has been devised.¹¹⁷ Likewise, the metropolitan Santiago area has been declared a contamination saturation zone by CONAMA, Chile's

¹¹¹ Reportorio de La Legislación de Relevancia Ambiental Vigente en Chile, Comisión Nacional del Medio Ambiente, Secretaria Técnica y Administrativa [Important Environmental Legislation in Chile, Report of the National Commission for the Environment, Technical and Administrative Secretary] (1992), at 195-97.

¹¹² *Id.* The President then signed Supreme Decree No. 185, which regulates sulfur dioxide pollution in mining, which was immediately enforced. *See* Ranta, *supra* note 110, at 431.

¹¹³ *See Showdown in Chile*, J. COMM., June 22, 1995, available in 1995 WL 8997990; Leo Gross, *On the Degradation of the Constitutional Environment of the United Nations*, 77 AM. J. INT'L. L. 569, 572 (1983); Edward C. Snyder, *The Dirty Legal War: Human Rights and the Rule of Law in Chile 1973-1995*, 2 TULSA J. COMP. & INT'L LAW, 253, 254-55 (1995). Even the military regime was said to have tanks that stopped at traffic lights during a coup. *See* Stephen Budiansky et al., *Democracy's Detour*, U.S. NEWS & WORLD REP., Jan. 27, 1992, available in LEXIS, News Library, Usnews File (retelling an old Chilean joke).

¹¹⁴ *See id.*

¹¹⁵ *See* Allen Boraiko, *Bright Hopes for Chile? Economic Development*, INT'L WILDLIFE, July 1995, available in LEXIS, News Library, Asapii File.

¹¹⁶ *See id.*

¹¹⁷ *See id.*

federal environmental protection agency, which reported that the emissions norms it will use will be similar to those in effect in California.¹¹⁸

A further testament to Chile's desire to establish and enforce an environmental legal regime is that the Chilean government has been shutting down older factories which tend to cause more pollution.¹¹⁹ Chile has also restricted the use of cars to alleviate the incredible amount of smog that affects Santiago.¹²⁰

Academics have also contributed to a greater environmental awareness. The University of Chile has released a study that highlights the costs of externalities to the Chilean population.¹²¹ The total comes to about \$435 million a year in health costs and in hours lost when factories have to shut down.¹²² The University report proposed a natural gas pipeline from Argentina to Chile which would cut emissions pollution from sulphur oxide and other contaminants by fifty percent and save Chile \$100 million a year.¹²³

Chilean environmental groups continue to campaign on behalf of the environment as well. The Chilean group RENACE began an inventory of the nation's forestry in 1994.¹²⁴ This accounting estimates that Chile's native forests will disappear in twenty years if current forestry practices continue.¹²⁵ The report as of October 1996 determined that ten million hectares were classified as native forests and as many as eleven to twelve million hectares could ultimately be so classified.¹²⁶ Pine and eucalyptus plantations have

¹¹⁸ See *Chile, Metropolitan Santiago to be Declared Contamination Saturation Zone* by CONAMA, BNA INT'L ENV'T DAILY, June 11, 1996, available in LEXIS, Envirn Library, Bnaied File.

¹¹⁹ See *Chile-Environment: Air Pollution Shuts Santiago*, Inter Press Service, July 18, 1994, available in LEXIS, Market Library, Iacnws File [hereinafter *Air Pollution*].

¹²⁰ See *id.*

¹²¹ See *id.*

¹²² See *id.*

¹²³ See *id.*

¹²⁴ See Boraiko, *supra* note 115.

¹²⁵ See *Environmentalists Achieve Legal Decision to Stop Forestry Megaproject*, Apr. 28, 1997 (visited on August 8, 1997) <<http://www.chiper.cl/library/001.html>> [hereinafter *Environmentalists*].

¹²⁶ See *Wood Chip Exports from Native Forests* (visited on Aug. 11, 1997)

replaced the demand on the native forests.¹²⁷ A 1996 report by Conaf, the National Forest Corporation, found that the use of native trees for wood chips may be declining because of the varying quality of chips coming from a number of different trees.¹²⁸ Eventually, native trees will instead be used in a sustainable manner for value-added products, such as parts and moldings for furniture, doors and windows.¹²⁹

More important than these significant, yet somewhat haphazard, efforts was Chile's attempt to impose some unifying structure on its environmental regime. It passed an environmental framework law in March 1994¹³⁰ and Regulations for the Development of Environmental Quality and Emission Norms and Regulations for Pollution Prevention and Control Plans were released in 1995.¹³¹ The 1994 legislation significantly includes the "polluter pays" principle.¹³² The law requires:

[1] environmental impact studies for projects that cause emissions, a potential risk to health, or require the relocation of communities;

[2] and the creation of a new type of lawsuit, the "environmental action," which allows citizens or government authorities to bring lawsuits against individuals and organizations to force polluters to restore the environment.¹³³

<<http://www.chip.cl/news/search/bol...ws\1996\10\24\fn3.html&value added>>.

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ Ley Sobre Bases Generales del Medio Ambiente [General Environmental Law], Ley No. 19.300, DIARIO OFICIAL DE LA REPÚBLICA DE CHILE, Mar. 9, 1994 *available in* (last modified Nov. 11, 1997) <<http://www.conama.cl/fhome.htm>> [hereinafter General Environmental Law].

¹³¹ See John Detzner & Pedro Alywin, *In Chile, Environmental Law Awaits Regulations*, NAT'L L. J., Dec. 23, 1996, *available in* LEXIS, News Library, Ntlawj File.

¹³² See *Chile's Environmental Framework Law Awaits President's Signature*, 4 ENV'T WATCH LATIN AM., Feb. 1994, *available in* LEXIS, Market Library, lacnws File [hereinafter *Framework*].

¹³³ *Id.* The opening of the process to the general public is a revolutionary step for Chilean law as is summarized below:

The proposed law would create a new cause of action for environmental restoration that would be an addition to whatever rights a person has under Chilean law to seek compensation for environmental damages. Restoration is

The law does not require that there be a showing of an intent to pollute, only that there be environmental damage in violation of existing environmental regulations.¹³⁴

This framework marked the first time that NGO's were able to legally challenge polluters, including the important parastatals still owned by the government,¹³⁵ such as the copper smelters and producers. Not surprisingly, Enami, the national copper smelting company, and Codelco, the national copper producer, are currently pursuing massive clean up and pollutant reduction plans.¹³⁶ The relationship between filing an EIS, receiving a permit, and liability or a safe "harbor" from liability has not been fully developed.¹³⁷

Another important characteristic of the law is that it allows for gradual adjustment by older industries, although new industries must comply immediately.¹³⁸ This rule combines environmental action with development and also lends credibility to the law for the private sector, which might not be able to comply with an unrealistic law.¹³⁹ Also, flexibility is demonstrated by the fact that clean-ups will be negotiated on a case by case basis.¹⁴⁰

The Chilean law is different from other Latin American laws, which are usually rigid codes that contain specific regulations.¹⁴¹

defined as the act of replenishing an environmental system or one of its components to a quality similar to that which existed prior to the contamination or, if that is not possible, to reestablish the basic properties of the system. Citizens would be allowed to bring actions for environmental restoration, apparently without the need to show that they have been directly affected by the damage.

Jensen, *supra* note 84, at 57.

¹³⁴ See *Framework*, *supra* note 132.

¹³⁵ See *id.*

¹³⁶ See *Environmental Issues Now Loom Large for Investors*, LAGNIAPPE LETTER, July 23, 1993, available in LEXIS, Market Library, Iacnws File [hereinafter *Issues*].

¹³⁷ See Jensen, *supra* note 84, at 57.

¹³⁸ See *Framework*, *supra* note 132.

¹³⁹ See *id.*

¹⁴⁰ See *id.*

¹⁴¹ See *id.* As related by one commentator quoting Rafael Asenjo, the head of CONAMA:

We went for a framework law and not for a code as in Peru, Mexico, or Colombia, because it is more realistic The Chilean law is a marvel of brevity, with only 93 permanent articles. Countries that write up enormous

Chile's traditional flexibility also manifests itself in the new environmental regulatory regime. The Chilean framework does have regulations, but CONAMA sets different limits, such as emissions, and will revise them every five years to ensure currency, compliance, and flexibility.¹⁴²

One commentator praised the 1994 legislation and Chile's attempts to create an environmental legal regime:

[R]equiring a project to be assembled according to the host country's environmental standards, has the benefit of recognizing the host country's sovereignty and authority. In a few developing countries, environmental standards are sufficiently well-established to make this approach work. An example of such a country is Chile

[T]he majority of developing nations have not followed the path[] of Chile . . . [and] are a long way from the example[] set by Chile¹⁴³

This flexible approach is a recognition of the special circumstances involved in a developing economy, even one as healthy as Chile's, which needs to adopt a measured and balanced response to the issues surrounding development and the environment.

Most importantly, the long awaited regulations governing the environmental impact evaluation system were released in 1997 and are discussed at length below.¹⁴⁴ The new environmental framework law draft was influenced both by multinational corporations who wanted clear rules to avoid future claims and by public concern.¹⁴⁵

Critics of the government have claimed that the government has sent confusing signals to its citizens, failed to actively enforce

codes setting ambitious goals and limits for all sorts of emissions suffer from having their regulations ignored and going quickly out of date

Id.

¹⁴² *See id.*

¹⁴³ Thomas Kerr, *What's Good for General Motors is Not Always Good for Developing Nations: Standardizing Environmental Assessment of Foreign Investment Projects in Developing Countries*, 29 INT'L LAW, 153, 159 (1995), available in LEXIS, Itrade Library, Intlaw File.

¹⁴⁴ *See infra* notes 196-224 and accompanying text.

¹⁴⁵ *See Issues, supra* note 136.

regulations, and that measures used by the twelve laboratories in charge of measuring factory emissions are faulty.¹⁴⁶ Furthermore, businesses have been reluctant to use measures that are preventative in nature, bowing only to restrictions when pollution reaches dangerous levels.¹⁴⁷ These problems and criticisms can be attributed to the relative novelty of the environmental legal regime and to a lack of awareness in both the general public and in the business community of adverse environmental consequences. The continued viability of these and many other reforms has been credited in part to the export sector, which feels pressure from the global marketplace to be up to par with global environmental norms.¹⁴⁸

3. *Environmental Progress in Chile*

To counter U.S. concern over Chile's ability to meet the NAFTA side agreement's tough environmental standards,¹⁴⁹ Chile is in the process of creating an advanced environmental regulatory system.¹⁵⁰ Simultaneous environmental reform and NAFTA accession in Mexico were certainly no coincidence.¹⁵¹ Similarly, Chile's renewed vigor in the environmental area can be attributed primarily to possible NAFTA accession.¹⁵² As one Chilean official stated: "Chile doesn't want to lose out on a free-trade agreement with the United States due to a poor environmental record."¹⁵³

In an effort to modernize its environmental regime, Chile entered into an environmental agreement with Canada in January 1995.¹⁵⁴ The agreement focused primarily on policy harmonization

¹⁴⁶ See *id.*

¹⁴⁷ See *id.*

¹⁴⁸ See Boraiko, *supra* note 115.

¹⁴⁹ See *Latin America and the Caribbean*, BNA Daily Rep. For Executives, Jan. 31, 1994, at 19, available in LEXIS, News Library, Drexec File.

¹⁵⁰ See *id.*

¹⁵¹ See *US and Mexican Officials Say NAFTA Is World's Most Environmentally Sensitive Trade Agreement; Critics Disagree*, 2 ENV'T WATCH LATIN AM., Aug. 1992, at 1, available in LEXIS, Market Library, Iacnws File.

¹⁵² See *id.*

¹⁵³ *Id.*

¹⁵⁴ See *Chile, Canada Sign Environmental Agreement*, 5 ENV'T WATCH LATIN AM.,

and information exchange.¹⁵⁵ The Canadian agreement specifically mentions "facilitat[ion]" of NAFTA accession for Chile as one of its goals in its preamble.¹⁵⁶

Chile and the United States signed an Environmental Framework Agreement (EFA) in 1993 as part of the Enterprise for the Americas Initiative (EAI).¹⁵⁷ The EAI allows the United States to use "debt for nature swaps," which is defined as "canceling or restructuring of one nation's debt in exchange for that nation's promise to support certain environmental programs or activities."¹⁵⁸ The agreement is an "umbrella type pact" which will

Mar. 1995, available in LEXIS, Market Library, Iacnws File [hereinafter *Chile, Canada Sign*]; *Agreement on Environmental Cooperation Between the Government of Canada and the Government of the Republic of Chile* (visited July 8, 1997) <http://www.ec.gc.ca/naapc-nace/english/new/conchileag_e.htm> [hereinafter *Environmental Cooperation*].

¹⁵⁵ See *Chile, Canada Sign*, *supra* note 154, at 1. The article reads in part:

On 26 January, Chile's National Environment Commission (Conama) and Environment Canada signed a memorandum of understanding on environmental cooperation. The agreement seeks to promote bilateral cooperation and establish a work program to harmonize environmental legislation and policies and address common issues such as air pollution and wastewater treatment.

Although the agreement does not specifically mention the North American Free Trade Agreement (NAFTA), Chile is becoming more and more concerned about what types of environmental requirements the NAFTA nations will make if Chile is to join the trade agreement.

The agreement also calls on the two countries to establish a Joint Environment Committee, consisting of an equal number of representatives from each country, to oversee implementation of the work program. The committee will work with a variety of public- and private-sector organizations to facilitate information exchange and joint actions.

Id.

¹⁵⁶ See *Environmental Cooperation*, *supra* note 154.

¹⁵⁷ See *Enterprise for the Americas Initiative Promotes Economic Growth*, U.S. Dept. of State Dispatch, June 29, 1992, available in LEXIS, News Library, Arcnws File [hereinafter *Enterprise for the Americas*]. The EAI was set in motion by President Bush to promote "free trade throughout the hemisphere, greater investment, . . . and increased environmental cooperation . . ." *Id.*

¹⁵⁸ Royal C. Gardener, *Taking the Principle of Just Compensation Abroad: Private Property Rights, National Sovereignty, and the Cost of Environmental Protection*, 65 U. CIN. L. REV., 539 (1997). Prior to the signing of the EFA, the United States had reduced Chile's debt by 40%. See *White House Background Briefing on the Visit of President Patricio Aylwin Azorca of Chile*, Fed. News Service, May 12, 1992, available in LEXIS, News Library, Arcnws File [hereinafter *White House Briefing*]. Chile, Bolivia, and

carry out specific projects and could include training on environmental impact assessment and hazardous waste and pollution prevention.¹⁵⁹

Also, Japan has notably pledged up to 749 million yen for environmental protection in Chile, mostly for technical training and equipment for Chile's Environment Protection Center.¹⁶⁰ Finally, the Multilateral Investment Fund, which is administered by the Inter-American Development Bank, granted Chile \$1.9 million in 1995 to promote and enforce environmental regulations in Chile.¹⁶¹

4. Supreme Court Takes an Activist Role

Chile's Supreme Court joined in the environmental fray by halting a large logging project in 1997.¹⁶² The seminal *Trillium* decision encouraged Chilean environmental groups who were doubtful that the Court would ever challenge the interests of an important project or foreign investor. In *Trillium*, the Chilean Supreme Court struck down government approval of a logging project, stating that CONAMA, Chile's environmental protection agency, had acted "illegally and arbitrarily" by allowing the \$350 million dollar project to proceed in violation of the Constitutional right of Chileans to live in a contamination free environment.¹⁶³ The Court also declared that the basic environmental law was

Jamaica reduced their debt and signed EFA's together under the EAI. See *Enterprise for the Americas*, *supra* note 157. The EFA's established environmental funds that are managed jointly by the United States and the host country. See *id.* The interest that would have been paid by the debtor country forms a corpus that will be supplemented by donations. See *id.* An estimated \$ 1.4 million will be invested through this fund for local projects in Chile. See *White House Briefing*, *supra*.

¹⁵⁹ *U.S. Chilean Environmental Agencies May Ink Bilateral Pact in Spring*, INSIDE NAFTA, Dec. 28, 1994, at 11 [hereinafter *Ink*].

¹⁶⁰ See *Japan to Give 749 mil. Yen in Grant Aid to Chile*, Japan Wkly. Monitor, Dec. 1, 1995, available in LEXIS, Market Library, Iacnws File.

¹⁶¹ See *MIF Grants \$1.9 million for the Promotion and Enforcement of Environmental Regulations in Chile* (visited on July 8, 1997) <<http://www.lab.org/PREWSA/CPI11195E.HTM>>.

¹⁶² See Jonathan Friedland, *Chile Court Rules Against U.S. Firm In Logging Case*, WALL ST. J., Mar. 21, 1997, at A14; Jonathan Friedland, *Green Chile, Across Latin America, New Environmentalists Extend Their Reach*, WALL ST. J., Mar. 26, 1997, at A1 [hereinafter Friedland, *Green Chile*].

¹⁶³ *Id.*

simply too vague.¹⁶⁴

The Court's verdict stated the following:

A) The project approved by COREMA and CONAMA is illegal because legislation covering Environmental Impact Statements is not applicable due to lack of regulations.

B) The approval was not only arbitrary, and reached without fundamentals, but contradicted all the technical recommendations of the government's own specialists who pointed out that "the information presented in the EIS was insufficient to make a decision on the sustainability of the project, as the continued existence of the forestry resource and its fundamental characteristics are not affirmed."¹⁶⁵

The court's action may be a blessing for CONAMA, which had been consistently "second guessed."¹⁶⁶ Without clear regulations, CONAMA's actions seemed too often motivated by political forces rather than technical rules or norms.¹⁶⁷ In response to this decision the government quickly passed Environmental Impact System (EIS) regulations.¹⁶⁸

5. *The Tompkins Project*

Support for environmental protection, however, is anything but unanimous in Chile. Pro-environment and pro-growth groups recently clashed over the role of an environmental reserve proposed by U.S. businessman Douglas Tompkins, founder of the Esprit clothing corporation. Tompkins purchased nearly 300,000 hectares in Southern Chile, which is two-thirds of the Palena province, and smaller parcels in Chile Chico and Balmaceda.¹⁶⁹ He invested over a billion dollars in the project and is the single largest landowner in the country.¹⁷⁰

¹⁶⁴ See *Chile's Environment*, INT'L HERALD TRIB., Apr. 30, 1997, at 8.

¹⁶⁵ *Environmentalists*, *supra* note 125.

¹⁶⁶ Friedland, *Green Chile*, *supra* note 162, at A6.

¹⁶⁷ See *id.*

¹⁶⁸ See *Chile's Environment*, *supra* note 164, at 8.

¹⁶⁹ See *U.S. Magnate Defends Environmental Project*, Mar. 24, 1995 (visited Aug. 12, 1997) <http://www.chip.clnews/search/bol...995\3\24\fn5.html&douglas, tompkins> [hereinafter *U.S. Magnate*].

¹⁷⁰ See *id.*

Tompkins wanted to establish a natural reserve to protect native trees on the property, but his proposal came under attack by a host of parties, including the military, the right wing, local affected communities, and members of the center left coalition.¹⁷¹ The military and the right wing expressed concern over the ownership of so much property along the Argentine border, as well as other national security issues.¹⁷² Because Tompkins' property essentially cuts the thin nation in half,¹⁷³ those concerned speculate that Tompkins' status as a U.S. citizen could provide a reason for the U.S. military to intervene on his behalf.¹⁷⁴

Salmon interests also challenged Mr. Tompkins and his foundation, the Deep Ecology Foundation, and many right wing legislators, who are major owners of salmon companies, have been accused of leading a campaign in order to thwart his plans for the preserve.¹⁷⁵ ENDESA, a large Chilean power company, sent a letter to the Office of the President opposing the park and accusing Tompkins of funding a variety of environmental groups opposed to Chilean growth.¹⁷⁶

The locals have accused Tompkins of forcing people off of their land in order to buy it,¹⁷⁷ and the native Mapuche have asked the government to declare the land a national preserve before granting Tompkins any tax concessions.¹⁷⁸ The Mapuche have also complained about the price paid for the property—less than ten dollars per hectare in some instances—and the fact that any reserve entrance or usage fees may be cost prohibitive to most

¹⁷¹ See *id.* President Frei, however, has endorsed the proposal. See *id.*

¹⁷² See *id.*

¹⁷³ The park cuts a solid swath across the country from the Argentinean border at the Andes Mountains to the Pacific Ocean. See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See *Ecologists Defend Tompkins* (visited Aug. 12, 1997) <[http://www.chip.cl/news/search/bol...995\5\12\fn1.html&douglas tomkins](http://www.chip.cl/news/search/bol...995\5\12\fn1.html&douglas%20tompkins)>.

¹⁷⁶ See *Tomkins Park Could Clash with ENDESA Projects* (visited Aug. 12, 1997) <<http://www.chip.cl/news/search/bol...1997\7\3fn1.html&douglas,tomkins>> [hereinafter *Clash*].

¹⁷⁷ See *U.S. Magnate*, *supra* note 169.

¹⁷⁸ See *Mapuces Oppose Plans for Park*, Apr. 5, 1995, (visited Aug. 12, 1997) <[http://www.chip.cl/news/search/bol...1995\4\5\fn6.html&douglas tomkins](http://www.chip.cl/news/search/bol...1995\4\5\fn6.html&douglas%20tompkins)> [hereinafter *Mapuces*].

Chileans, barring them from enjoying the preservation of their own natural resources.¹⁷⁹

Leftist nationalists have also opposed the park, seeing it as a threat to Chilean sovereignty in accord with most of the opposition from the right.¹⁸⁰ In contrast, socialist Enrique Correa, former Secretary General of the Presidency, publicly opposed any limits on ownership of private property because he feared that it would discourage future foreign investment.¹⁸¹ This is quite a striking statement from a prominent representative of the party of Allende, the architect of Chile's past expropriation, nationalization, and land redistribution.

In July 1997, the government and Mr. Tompkins came to an agreement over the area.¹⁸² The solution gave the land to a private foundation with Bishop Juan Luis Ysern and Tompkins sitting on the board.¹⁸³ The board will have four of seven members appointed by Tompkins and the remaining will be appointed by Chilean religious and academic institutions.¹⁸⁴ The agreement also required the government to protect the land from development interests, deem it a sanctuary, and exempt it from taxes.¹⁸⁵ The preserve was designed to "showcase the diversity of Chile's ecology."¹⁸⁶ Tompkins also agreed to guarantee continued public access into the area.¹⁸⁷

At the heart of this very complicated dispute were many of the same tensions present in Chile as a whole, especially those between environmentalists and neo-liberalists. This debate and the resulting political tension are refreshing in a region known for its silence in the public forum. The dispute demonstrates the

¹⁷⁹ *See id.*

¹⁸⁰ *See Clash, supra* note 176.

¹⁸¹ *See id.*

¹⁸² *See* Anthony Faiola, *Chile, American Agree on Controversial Nature Preserve* (visited Aug. 11, 1997) <<http://search.washingtonpost.com/w...ch/1997-07/09/044F-o70997-idx.html>>.

¹⁸³ *See id.*

¹⁸⁴ *See id.*

¹⁸⁵ *See id.*

¹⁸⁶ *Id.*

¹⁸⁷ *See id.*

complexity of environmental and investment issues and highlights Chilean ingenuity in achieving a resolution that both protected the environment and placated the opposition.

6. 1997 Regulatory Reforms

Chile's crowning regulatory achievement in the environmental area was the release of detailed Environmental Impact Evaluation Systems regulations in April 1997, which further developed the environmental legal regime.¹⁸⁸ Under the regulations, all companies or entities taking any action which put the environment at risk must complete comprehensive studies and reviews of their proposed action for regulatory scrutiny. The essential framework mirrors the highly effective EIS system in the United States.

The new regulations envision a highly-developed enforcement scheme. Enforcement power would be spread between relevant ministries or regulatory authorities and includes administrative penalty authority.¹⁸⁹ Relevant authorities could be those which helped develop the standard at issue.¹⁹⁰ Administration of enforcement is the primary responsibility of CONAMA.¹⁹¹ As one commentator explained:

The proposed law would vest primary authority over national environmental issues in [CONAMA]. The commission would not be a separate ministry, but would be governed by an executive council comprised of several ministers. Its duties would be administered through an executive secretariat and various Regional Commissions on the Environment (COREMAS).

It would clarify from a bureaucratic standpoint:

¹⁸⁸ See *Reglamento Del Sistema de Evaluación de Impacto Ambiental* [Regulations on the Methods for Environmental Evaluation], art. 2(b), available in (last modified Nov. 11, 1997) <<http://www.conama.cl/fhome.htm>> [hereinafter *Regulations on Environmental Evaluation*].

¹⁸⁹ See Jensen, *supra* note 84, at 57. Chile's existing laws that touch on environmental matters would be left in place and the framework law would give overall direction and unifying purpose to the implementation of those laws. The framework law does not explain how any inconsistencies between it and the other laws would be resolved. See *id.*

¹⁹⁰ See *id.*

¹⁹¹ See *id.* at 25.

- [1] how and by whom environmental regulations and policy will be developed and enforced;
- [2] establish a comprehensive system for evaluating the environmental impacts of public and private activities;
- [3] authorize and give direction on the establishment of environmental standards; and
- [4] establish the guiding principles on liability for violating environmental standards or causing environmental damage.¹⁹²

The framework law is just that, a framework, and as such does not set any substantive environmental standards or provide "clear guidance" as to the proper clean-up levels desired.¹⁹³ Standards are the responsibility of the "affected ministries, and facilitation and coordination of the process to CONAMA."¹⁹⁴ The Chileans regard this as necessary flexibility for their emerging industries; critics may regard this as too vague and the lack of clear standards a dangerous precedent. However, as has been indicated above, Chile seems eager to adjust or adapt their laws to meet NAFTA requirements and have taken steps to do so.

Looking at the new regulations in more detail, they essentially track the General Law, providing a general inventory of how varied projects may affect geographical conditions and resources in Chile. The regulations, in accord with the General Law, allow any state or quasi state entity which has functions related to the environment to apply the regulations.¹⁹⁵

Article 3 of the regulations describes the projects or activities that require application of the regulatory scheme.¹⁹⁶ It discusses waterworks (such as dams, reservoirs, or diversions of rivers), power projects (including nuclear reactors), commercial development (mining, oil and natural gas, factories), and agricultural projects in greater detail than Article 10 of the General Law.¹⁹⁷

¹⁹² *Id.* at 57. See General Environmental Law, *supra* note 130.

¹⁹³ See Jensen, *supra* note 84, at 25.

¹⁹⁴ *Id.*

¹⁹⁵ See *Regulations on Environmental Evaluation*, *supra* note 188, art. 2(b).

¹⁹⁶ See *id.* art. 3(a)(1).

¹⁹⁷ See *id.* art. 3.

Article 4 sets out the circumstances that require an Environmental Impact Study ("EIS") as opposed to the less intensive Environmental Impact Declaration ("EID").¹⁹⁸ Voluntary submissions and all projects of the type described in Article 3 require an EIS.¹⁹⁹

Article 5 requires an EIS if the project or activity generates a risk to the public health.²⁰⁰ The risk is determined by measuring the quality and quantity of the vapors, emissions or waste produced by the project.²⁰¹ Norms are to be set by the appropriate state entities; but, in the event that norms are not set at the time, the standards set by the Swiss Confederation will be substituted.²⁰² An EIS is also required under Article 6 if the project presents a significant detriment to the quality or quantity of renewable natural resources of the earth, water and air.²⁰³

Article 8 discusses how to analyze potential effects on the public in an area where an EIS is required and Article 8(a)(c) describes the factors to be used in such an analysis, including demographics, religious or folkloric traditions, and access to natural resources for particular groups guaranteed certain protections under the law.²⁰⁴

The regulations consider not only the interests of indigenous groups protected by law, but also preservation of the culture of other groups and existing profitable associations. The reference to existing profitable associations in 8(c) could include, for example, a group of local independent fishermen.²⁰⁵ This regulation acknowledges that tourism, whether eco-tourism or otherwise, requires preserving certain aspects of Chilean society. However, the regulations do not mandate such a requirement, which is compatible with the policy flexibility required by sustainable

¹⁹⁸ *See id.* art. 4.

¹⁹⁹ *See id.*

²⁰⁰ *See id.* arts. 5, 7.

²⁰¹ *See id.*

²⁰² *See id.*

²⁰³ *See id.* art. 6.

²⁰⁴ *See id.* art. 8.

²⁰⁵ *See id.* art. 8(c).

development.²⁰⁶ It gives the Chilean government broad options in balancing environmental and developmental concerns.

Article 9 requires an EIS if the project is situated near the public, public resources or protected areas that are sensitive and susceptible to alteration.²⁰⁷ Article 10 requires an EIS if a project will jeopardize landscapes or other areas that have tourism value.²⁰⁸ Article 11 requires an EIS if the project affects the cultural wealth of Chile, including monuments, archeological sites, sites with anthropological importance, etc.²⁰⁹ Enacted law defines monuments,²¹⁰ and the regulations allow the government to take into account the following factors to determine if the cultural wealth of Chile is being affected: structural characteristics of the site, antiquity, scientific value, historical context, importance to the Chilean cultural wealth, or whether or not the site carries with it a particular significance to an identifiable community or group which carries on certain traditions on that site.²¹¹

Title III of the regulations, Articles 12-16, describe the exact requirements of an EIS. An index and summary, not to exceed thirty pages, is required.²¹² The summary must do the following: 1) describe the project, 2) describe a plan of compliance with the applicable legislation and regulations, 3) identify which portion of Article 11 of the General Law requires the EIS, 4) include an identification, prediction and evaluation of the eventual risk from the project, 5) include a plan for the mitigation, reparation and compensation associated with the project, if necessary, 6) specify the methods of controlling risk and accident prevention, if necessary, and 7) include a plan which addresses the original conditions which required the EIS.²¹³

These provisions also require that the EIS be a self-contained

²⁰⁶ See *supra* notes 138-43 and accompanying text.

²⁰⁷ See *Regulations on Environmental Evaluation*, *supra* note 188, art. 9.

²⁰⁸ See *id.* art. 10.

²⁰⁹ See *id.* art. 11(a)-(c).

²¹⁰ See *id.* art. 11(a).

²¹¹ See *id.* art. 11(a)-(d).

²¹² See *id.* art. 12(a)-(b).

²¹³ See *id.* art. 12(c)-(k).

document, be drafted in a manner understandable to laymen, and still be in compliance with the specifics outlined in sections (c) through (k) of Article 12.²¹⁴ Article 13 simply requires the information to be supported and that the necessary addenda and EIS be in the official language of the Republic of Chile.²¹⁵

Articles 14-16 briefly outline the requirements for the EID, which applies to projects that correspond to the requirements of Article 11²¹⁶ or that voluntarily submit to the system.²¹⁷ Articles 17-49 discuss the procedure for an evaluation for the submission of an EIS and EID, as well as the substantive requirements for government reports and responses, including a required Technical Assessment Report.²¹⁸

Article 49, which requires that the file and all attending documents be open to the public, is especially significant, although an interested party may petition the government to keep certain intellectual property confidential.²¹⁹ Articles 50-55 provide for public participation in the system and Articles 56-57 discuss the process of confidential classification of materials, noting that any information relating to the circumstances that necessitated the EIS as specified in Article 11 of the General Law, will not be deemed confidential.²²⁰

The provisions on community participation require the government to establish the proper mechanisms for public participation.²²¹ The project owner or manager must publish a summary of the EIS in the *Diário Oficial* or in a paper of national circulation or in a paper in circulation in the capital of the region in question.²²² An interested organization, such as an NGO, or an

²¹⁴ See *id.* Article 12 (c)-(k) outlines the specifics needed to comply with Article 12(b). See *id.*

²¹⁵ See *id.* art. 13.

²¹⁶ See *supra* note 211 and accompanying text.

²¹⁷ See *Regulations on Environmental Evaluation*, *supra* note 188, arts. 14-16.

²¹⁸ See *id.* arts. 17-49.

²¹⁹ See *id.* art. 49.

²²⁰ See *id.* arts. 50-57.

²²¹ See *id.* art. 50.

²²² See *id.* art. 51.

individual can submit her own evaluation of the project.²²³ The government also publishes a list of projects that have filed an EID.²²⁴

The National Wildlife Federation, the Sierra Club, National Audubon Society, Community Nutrition Institute and the Center for International Environmental Law testified before the Senate Finance Committee on June 3, 1997 that a system of Environmental Impact Assessments, very similar to the one developed by Chile, should be employed in the fast track bill in order to "support[] the use of trade rules to promote sustainable development."²²⁵ The use of a federally required EIS "should ensure [that]: (i) the EIS will be prepared early enough in the negotiation process to guarantee timely public disclosure; (ii) adequate opportunity is provided for public comment; and (iii) negotiations take account of the analysis produced."²²⁶ Central to the goal of the EIS, both in the NWF proposal and the Chilean regulations, are transparency, access to information, and public comment.

7. Solid Enforcement of International Obligations

Chile is also taking international environmental obligations seriously. In August 1994, Chile refused to allow a Croatian freighter, the Triglav, to dock as planned in the port of San Antonio.²²⁷ Authorities discovered that it was carrying toxic waste in violation of the Basilea Convention, and they refused the Triglav entry.²²⁸ Chile has also lodged complaints against Japan, Britain, and France for their involvement in the transport of fourteen tons of radioactive material by a British freighter through

²²³ See *id.* art. 53.

²²⁴ See *id.* art. 55.

²²⁵ *Prepared Testimony of Mark Van Putten, President, National Wildlife Federation Before the Senate Finance Committee Subject Extension of 'Fast Track' Negotiating Authority*, Federal News Service, June 3, 1997, at 33, available in LEXIS, Genfed Library, Fednew File.

²²⁶ *Id.* at 36.

²²⁷ See *Chile Environment: Ship Carrying Toxic Waste Due Next Week*, Inter Press Service, Aug. 11, 1994, available in LEXIS, Market Library, Iacnws File.

²²⁸ See *id.*

the Drake passage, one of the most dangerous navigational passages in the world and within Chile's economic zone.²²⁹

8. *Environmental Leadership in Mercosur*

Chile has also moved towards linking trade and the environment in its free trade proposals to other Latin American countries. In a proposal to Mercosur, Chile indicated it desires more than the simple elimination of tariffs and non-tariff barriers—it wants a regional free trade area that includes services and protection of intellectual property and the environment.²³⁰ This goes even beyond Brazil's proposal for a South American Free Trade Area (SAFTA).²³¹ In the past, Mercosur has not been very active in the environmental area,²³² but Chile's associate membership may continue to bring environmental issues to the table.

In short, the environmental demands of NAFTA should not bar Chilean accession. Many U.S. and Chilean environmental groups do remain skeptical of Chile's environmental sincerity. But whatever wrinkles remain in Chile's environmental regime are due primarily to "growing pains,"²³³ rather than duplicity. Chief Chilean NAFTA coordinator, Juan Gabriel Valdes, stated that Chilean environmental legislation "conforms perfectly with the text of NAFTA agreements on labor and environmental matters"²³⁴ Especially in light of recent regulatory reform, Chile stands environmentally ready to enter NAFTA.

²²⁹ See *Chile to Protest Against British Nuclear Freighter*, DEUTSCHE PRESSE-AGENTUR, Mar. 20, 1995, available in LEXIS, News Library, Dpa File. The freighter had also angered Argentina which has a similar ban on transporting such materials through its waters. See *id.*

²³⁰ See *Chilean Proposal to Mercosur Seeks Wider Coverage than SAFTA*, INSIDE NAFTA, June 29, 1994, at 1.

²³¹ See *id.*

²³² See *Mercosur Agreement Takes Effect, Environment Not a Priority*, ENV'T WATCH LATIN AM., Feb. 1995, available in LEXIS, Market Library, Iacnws File.

²³³ See *id.*

²³⁴ *Chile Won't Negotiate its Entry into NAFTA Twice, Official Says*, INSIDE NAFTA, Mar. 8, 1995, at 19 [hereinafter *Negotiate*].

9. *The Mexican Model*

Mexican accession to NAFTA was troubled by a number of environmental issues, none of which should present a problem to Chilean accession. The United States was understandably concerned about the neighboring Mexican environment, but it has less self-serving reasons for concern about Chile's environment.

Although Mexico had a well-developed regulatory regime prior to NAFTA,²³⁵ it was largely ineffective because of a lack of enforcement.²³⁶ Risks for companies in violation of Mexico's legal environmental regime, however, increased dramatically during the NAFTA negotiations.²³⁷ Mexico increased its environmental enforcement dramatically, "inspect[ing] 5,045 plants throughout Mexico, resulting in 980 partial or temporary closings and three permanent closings."²³⁸ Government expenditures for environmental control programs were budgeted at six million

²³⁵ See Kenneth N. Frankel, *Mexico Gets Tough Mexico: Environmental Regulations Strengthened in Preparation for NAFTA*, LATINFINANCE, Mar. 1992, at 39. The Mexican laws are summarized as follows:

Mexico's regulatory regime is similar to the U.S. regulatory framework. The backbone of Mexico's environmental laws is the General Law of Ecological Equilibrium and Environmental Protection ("the General Law"), which was enacted in 1988.

The General Law contains specific chapters concerning air, water, soil, hazardous waste, noise, vibration, thermal energy, lighting, odor and visual pollution. It also sets out enforcement procedures and other provisions concerning the respective responsibilities of the federal and state governments.

Mexico's laws are prospective and do not contain provisions as sweeping as the Superfund provisions contained in U.S. law to handle past waste disposal problems, although such measures are being discussed currently in Mexico.

The Secretariat of Urban Development and Ecology ("SEDUE") is the federal body which oversees the enforcement of the General Law. Although several of Mexico's 32 states have also promulgated environmental laws, SEDUE is the only governmental entity actively engaged at present in enforcement.

Id.

²³⁶ See *Demythologizing the Trade Pact*, N.Y. TIMES, July 25, 1993, at D16; James Gerstenzang, *Judge Deals Blow to Free Trade Pact*, L.A. TIMES, July 1, 1993, at A1.

²³⁷ See *id.*

²³⁸ *Id.* "From only January 1, 1991, to May 15, 1991, there were 275 plants inspections in Mexico City alone which resulted in temporary or partial closing of more than 102 facilities and two permanent closings." *Id.*

dollars in 1988, to increase to over several billion dollars in the next decade.²³⁹

Mexican companies could no longer rely on relaxed enforcement and simply ignore or claim ignorance of the environmental regulations.²⁴⁰ Non-compliance can result in civil and criminal penalties, "clean up" bonds, temporarily or permanently stopping operations, and negative publicity associated with being a corporate polluter.²⁴¹ For example, the Mexican government closed a large oil refinery in Mexico City as part of a citywide compliance campaign intended to reduce pollution from metal forging, chemical, cement and paper production plants.²⁴² The closing was noteworthy because it resulted in the loss of approximately 6,000 jobs.²⁴³

The U.S. Environmental Protection Agency also established an office in Mexico City to help the Mexican government "in enforcing Mexico's environmental laws and coordinating transborder enforcement of [both the U.S. and Mexican] environmental laws."²⁴⁴ The Mexican agreement established the North American Development Bank (NADBank) to finance border environmental projects, "such as sewage treatment facilities and community renewal programs."²⁴⁵

Because Chile does not share a border with the United States, Chilean membership in NAFTA would not necessarily entail such heavy U.S. involvement in and oversight of the Chilean environment.

²³⁹ *See id.*

²⁴⁰ *See id.*

²⁴¹ *See id.*

²⁴² *See id.*

²⁴³ *See id.*

²⁴⁴ *Id.* The office has also been involved in developing border pollution control policies, especially in light of lawsuits filed against eight U.S. corporations for illegally exporting waste into Mexico. *See id.*

²⁴⁵ *Ratify, supra* note 104. Over a four year period, "the United States and Mexico will each contribute \$225 million that will be leveraged into \$2-\$3 billion." *Id.* A Border Environmental Cooperation Commission will "review projects submitted for financing from NADBank and [coordinate] private capital to help industry comply with environmental regulations." *Id.*

B. The U.S. Political Landscape and Other Accession Concerns

If Chile is so well poised to become a NAFTA member, then what are the real obstacles to Chilean accession? As stated above, the debate over Chilean accession into NAFTA really isn't about Chile entering NAFTA. The debate involves the precedential value of the process which will be used to accept another country into the agreement. The process adopted to bring Chile in will probably become the manner to let in all future entrants. Chile itself does not present a problem. Chile is amenable to the environmental side agreements and seems to want the laws in place for their own good.

The congressional debate involves a Republican attempt to use Chilean accession to undo the link between trade and environment in NAFTA, specifically the trade sanctions used to enforce environmental compliance. The Republican House has indicated in the past it will fight linking the environmental side agreements to fast track authority.²⁴⁶ Some Republicans, however, have indicated that a compromise that tackled soft enforcement, or other such unfair trade practices, could be suitable to them.²⁴⁷

The Republicans also argue against the use of trade sanctions to enforce the environmental provisions of the side agreement. One implication of this argument is that Republicans are worried that environmentalism will disguise unilateral trade aggression, which could eventually erode and destroy the multilateral trade regime. A more likely possibility is that the Republicans do not want trade sanctions to be used against U.S. corporations. In any event, Republicans have indicated, again, as noted above, that a compromise might be reached.²⁴⁸

Chile's case may not fare much better with the Democrats. In August 1997, Congressman Richard Gephardt made a "fact-finding trip" to Chile, Argentina, and Brazil.²⁴⁹ *The Wall Street*

²⁴⁶ See John Maggs, *Chile's Move to Mercosur May Pave its Way Into Nafta*, J. COMM., July 8, 1996, available in LEXIS, Market Library, Prompt File.

²⁴⁷ See Lewis, *supra* note 2, at 5.

²⁴⁸ See *id.*

²⁴⁹ Leslie Crawford, *Gephardt Heads for Santiago Trade Talks*, FIN. TIMES, Aug. 13, 1997, available in LEXIS, Market Library, Prompt File.

Journal characterized Mr. Gephardt's visit to Latin America in the summer of 1997 with the following:

The tour was billed as an opportunity to look at "economy, trade, defense and foreign policy issues." But given Mr. Gephardt's union constituency back home, the more likely purpose was strategizing for the upcoming congressional fast-track debate and, of course, preparing for a run at the presidency in 2000.²⁵⁰

There was an obvious and understandable lack of interest in Gephardt's visit in Santiago, where he was received politely, but without much fanfare.²⁵¹ This reception was understandable in light of Gephardt's record on NAFTA. He originally stopped momentum and stalled NAFTA approval,²⁵² which had been one of the most bipartisan movements in its time.²⁵³ Gephardt has been a staunch opponent of any trade agreement that does not have stronger protections for labor and the environment,²⁵⁴ despite the fact that Chilean labor and environmental interests are split over these issues.²⁵⁵

The influence of American presidential politics on the Chilean economy has left Latin America's free trade proponents more than a little disgusted. They too have to fight protectionist holdouts at

²⁵⁰ Mary Anastasia O'Grady, *Latins are Victims of Democrats' Trade Politics*, WALL ST. J., Aug. 22, 1997, at A15.

²⁵¹ See *id.*

²⁵² See Jagdish Bagwati, *Is This Showdown Necessary*, NEWSDAY, June 11, 1995, available in LEXIS, News Library, Bustdl File; Joyce Barnett, *Gephardt to Insist on Labor Regs for Expanded NAFTA*, Daily News Record, Mar. 31, 1995, available in LEXIS, News Library, Asapii File.

²⁵³ See *President Clinton's First Year Accomplishments*, U.S. News Wire, Jan. 24, 1994, available in LEXIS, News Library, Usnwr File; Nancy Dunne, *Clinton Pressed to seek NAFTA Changes*, FIN. TIMES, Sept. 18, 1992, available in LEXIS, Market Library, Prompt File (noting the development of NAFTA by Republican Presidents Reagan and Bush, mostly with bipartisan support).

²⁵⁴ See Lewis, *supra* note 2; Jim Landers, *U.S. Seeking Role as Free Trade Grows in Latin America*, DALLAS MORNING NEWS, Aug. 4, 1997, available in LEXIS, News Library, Dalnws File.

²⁵⁵ Chile's largest trade union does not oppose NAFTA, but wants inclusion of the side agreements. See *Chile NAFTA Deal Must Include Labor Rule—Union*, Reuters Final Service, Feb. 28, 1997, available in LEXIS, Busfin Library, Reufin File. Chilean ecologists feel NAFTA will lower current Chilean environmental protections. See *id.*

home, and that's much tougher when the United States, "rather than stand by its promises, plays political games."²⁵⁶

U.S.-organized labor has become bolder in light of the continued attacks on NAFTA and free trade by Gephardt. Democrat Calvin Dooley, who will vote for fast track despite labor opposition, stated: "If this were a secret ballot . . . fast track would pass by an overwhelming margin. But labor is playing hardball on this one, and they are being very direct with members."²⁵⁷

U.S. labor is also mounting a major radio and television ad campaign as well as mobilizing workers to put added pressure on the White House and Capitol Hill.²⁵⁸ Reporters have speculated that the success of the U.P.S. settlement has reinvigorated labor's efforts in this area.²⁵⁹ U.S. business is also responding because the delay could mean that business loses its bargaining position and might not be able to expand into badly needed new markets. As one U.S. CEO, Robert J. Eaton of Chrysler, relates: "Without fast-track, we won't make any significant gains We'd be allowing the rest of the world to set the trading rules."²⁶⁰ Tariffs, for example, make quite a competitive difference, even at Chile's low eleven percent rate, when Canadian and Mexican companies pay zero percent.²⁶¹

President Clinton finally asked for fast track authority in late September 1997, and the request comports with the Congressional Republican desire to avoid linking the environment and labor to any trade deals.²⁶² Specifically, the White House asked for fast-

²⁵⁶ *Id.*

²⁵⁷ Glenn Burkins, *Labor Fights Against Fast-Track Measure*, WALL ST. J., Sept. 16, 1997, at A24.

²⁵⁸ *See id.*

²⁵⁹ *See* Amy Borrus et al., *Business is in Hurry for Fast-Track*, BUS. WK., Sept. 15, 1997.

²⁶⁰ *Id.*; *see also* Robert Mosbacher, *U.S. Exporters to Latin America Need Fast-Track*, WALL ST. J., Sept. 12, 1997, at A23 (discussing the effects of the delay in fast track authority on U.S. exporters with specific examples of the trouble U.S. companies have experienced).

²⁶¹ *See id.* at 40.

²⁶² *See* Bob Davis & Greg Hitt, *Clinton Asks for Trade-Pact Authority, Avoiding Labor, Environmental Issues*, WALL ST. J., Sept. 17, at A2. President Clinton conceded defeat on fast-track in early November. *See* Art Pine & Janet Hook, *Clinton Pulls Trade*

track because even if environmental protection measures in trade pacts "somehow passed the [R]epublican-controlled Congress, [they] would be rejected by negotiating partners abroad."²⁶³ The White House did add language, however, to its proposal to the effect that U.S. negotiators would work to strengthen workers' rights through the World Trade Organization (WTO) and the International Labor Organization (ILO). Its proposal would also allow negotiators to pursue positions whereby other nations could not lower their labor and environmental standards and gain a competitive advantage over the United States.²⁶⁴ The administration's proposal does not prevent the White House from pursuing separate side agreements.

Practically speaking, the only real obstacles to Chilean accession seem to be internal U.S. political problems. The Canadian and U.S. governments have indicated that accession should include the side agreements and that they want Chile to agree to the accords.²⁶⁵ The Chilean American Chamber of Commerce has stressed its desire to prevent environmental and labor issues from becoming major issues during the trade talks, especially the linking of environmental and labor issues with fast track authority.

Ambassador Mickey Kantor, however, wished to keep the side agreements "as is," finding it very difficult to imagine how NAFTA could hold different requirements for different countries.²⁶⁶ Some Democrats indicated that the United States Trade Representative (USTR) might not need fast track for Chile anyway and that negotiations can be carried out under normal legislative rules.²⁶⁷ Chilean negotiators agree with the USTR that

Bill Rather Than Risk Defeat, L.A. TIMES, Nov. 10, 1997, at A1. For further discussion of fast-track's failure, see *infra* notes 276-82 and accompanying text.

²⁶³ *Id.*

²⁶⁴ *See id.* at A10.

²⁶⁵ *See COECE, supra* note 46, at 3.

²⁶⁶ *See Archer Sees no Deals with Administration, Democrats on Fast Track*, INSIDE NAFTA, Feb. 22, 1995, at 3.

²⁶⁷ *See id.* Kantor said that negotiations could begin without fast track authority, but any country would be hesitant to conclude trade negotiations without it. *See id.* Democrats disagree, believing that negotiations can be concluded without fast track. *See id.*

proceeding with the texts "as is" is far easier than coming up with other agreements.²⁶⁸ The present administration, including USTR Barshsefsky, has avoided discussing the preference for NAFTA accession or a bilateral agreement because of the intense U.S. political considerations that exist with either option.

Chile does not want to become embroiled in the debate between Republicans and Democrats over fast track. It simply does not want to negotiate the same agreement twice.²⁶⁹ Chile may want to incorporate its FTA with Mexico in the same way the U.S. CFTA was incorporated into NAFTA.²⁷⁰ The North American Commission for Environmental Cooperation (NACEC) endorsed the idea that future entrants into NAFTA be required to adhere to the side agreements because this would avoid creating "double standards" in the region.²⁷¹

Many of the earlier considerations in favor of redrafting an agreement are already moot because the principles behind the agreement are continually being redrafted with each agreement that Chile signs or negotiates. The Canada-Chile FTA and the Mercosur associate membership, as well as the future Chile-European Union-FTA all set precedents of their own and shape the free trade potential of the Americas without the input of the United States.

The United States' tardiness on fast track and Chilean accession has led some, including Thomas Andrew O'Keefe, the President of Mercosur Consulting, to suggest that Chilean accession is now a "dead issue."²⁷² According to Mr. O'Keefe, Chile's associate membership in Mercosur ended the expansion of NAFTA into South America by accession. Because Bolivia and the Andean nations will likely follow Chile's lead and join

²⁶⁸ See *Negotiate*, *supra* note 234, at 19.

²⁶⁹ See *id.*

²⁷⁰ See *id.*

²⁷¹ See Kevin G. Hall, *NAFTA's Environmental Czar Wants to Include Chile - Side Accords*, J. COMM., Dec. 6, 1996, available in LEXIS, Market Library, Prompt File.

²⁷² See Prepared Statement of Thomas Andrew O'Keefe, President, Mercosur Consulting Group, LTD. before the House International Relations Committee International Economic Policy and Trade Subcommittee, *Fast Track, NAFTA, Mercosur and Beyond: Does the Road Lead to a Future Free Trade Area of the Americas?*, Federal News Service, July 9, 1997, available in LEXIS, Genfed Library, Fednew File.

Mercosur, the United States will be negotiating with a South American trade bloc with interests quite different from NAFTA.²⁷³ Mr. O'Keefe cites to Article 52 of the Mercosur agreement which requires any favorable tariff concession granted by Chile to be granted to Mercosur or otherwise Chile must negotiate "equivalent compensation."²⁷⁴ Mercosur has already requested that Chile grant concessions comparable to those it gave Canada under the Chile-Canada FTA.²⁷⁵

In November 1997 the Clinton administration suffered a serious setback in the postponement of a vote on fast track in the House due to the inability of the President, who seems to be a lame duck early in his second term,²⁷⁶ to bring in enough votes from his own party.²⁷⁷ The defeat was characterized as "rais[ing] questions about the long term viability of the so-called 'U.S. model' of open markets, deregulation and privatization."²⁷⁸ A leading Japanese paper editorialized that "Clinton's fast-track debacle signals the end of the era when progress in the liberalization of the world trade depended on U.S. initiatives," and called for Europe and Japan to fill the leadership vacuum.²⁷⁹ The loss was widely blamed on the political discontent of fellow

²⁷³ See *id.*

²⁷⁴ See *id.*

²⁷⁵ See *id.*

²⁷⁶ See "No Sale," *Failure of Fast-Track Trade Bill Does U.S. Economy a Disservice*, CINCINNATI ENQUIRER, Nov. 20, 1997, at A18, available in LEXIS, News Library, Curnws File [hereinafter *No Sale*]. But see Brian Knowlton, *As APEC Opens, the Mood is of Resistance*, INT'L HERALD TRIB., Nov. 22-23, 1997, at 11, 15 (contending that the effect of the fast-track loss in Congress on the 1997 APEC meeting was countered by the strong U.S. economy, which acts as moral leverage against countries suffering the effects of mismanaged economies seeking multilateral support). The *Financial Times* called the defeat the worst in the past three years. See *Clinton Fast-Track Defeat*, FIN. TIMES, Nov. 11, 1997, available in LEXIS, News Library, Curnws File.

²⁷⁷ See Ann Scales, *Clinton-House Democrats Rift Widens; Failure of "Fast Track" Trade Initiative Seen as Symbol of Relations Gone Sour*, BOSTON GLOBE, Nov. 16, 1997, at A11, available in LEXIS, News Library, Curnws File; *With U.S. Off Trade Fast Track, Japan, Europe Need to Step Up Pace*, NIKKEI WKLY., Nov. 17, 1997, at 16, available in LEXIS, News Library, Curnws File [hereinafter *Step Up*].

²⁷⁸ Jim Lobe, *Economy: Fast-Track Defeat a Blow to U.S. Model*, Inter Press Service, Nov. 12, 1997, available in LEXIS, News Library, Curnws File.

²⁷⁹ *Step Up*, supra note 277, at 16.

Democrats with trade and non-trade issues,²⁸⁰ as well as further jockeying for the democratic presidential candidacy in the next election.²⁸¹ The BBC reported that the Chilean government was "indifferent" to the result, and President Frei stated that "[t]his is strictly a U.S. problem[;] it is not a Chilean problem. Chile continues its traditional policies on international trade."²⁸²

IV. Conclusion and Proposal

Chile has been a model among Latin American countries, both economically and due to its bloodless transition from military regime to a democracy. It has brought down trade barriers and influenced the economic policies of its neighbors to adopt similar policies.²⁸³ It also did not hesitate to take the lead in developing an environmental regime which could balance economic growth and conservationism. Denying Chile accession into NAFTA over highly politicized U.S. internal disagreements will destroy the efforts of three U.S. administrations to promote hemispheric growth and stability through free trade.

Chile has taken great pains to comply with the environmental principles outlined in the NAFTA side agreement. If any current inconsistencies exist, these still should not keep Chile out of NAFTA. The enforcement mechanism in the side agreement is arguably necessary only because of Mexico's previous history of relaxed enforcement and because of its border with the United States. Theoretically, Chile would be free of the necessity of having environmental protection linked with trade sanctions because it has no such proximity to the United States.

Past deficiencies in Chilean environmental enforcement appear to stem from many problems which the new environmental law is

²⁸⁰ See Scales, *supra* note 277, at A11. Blame was also placed squarely on the President's shoulders in another editorial: "If Mr. Clinton is looking for someone to blame, he should look in a mirror. His year long procrastination and wimpy last gasp effort to convince congressional opponents, mostly in his own Democratic party, doomed the trade bill which he said should have been a 'no-brainer.'" *No Sale*, *supra* note 276, at A18.

²⁸¹ See *Step Up*, *supra* note 277, at 16.

²⁸² *Government Indifferent to Clinton "Fast Track" Failure*, BBC Summary of World Broadcasts, Nov. 18, 1997, available in LEXIS, News Library, Curnws File.

²⁸³ See *supra* notes 16-43 and accompanying text.

supposed to remedy, most notably the consolidation of legal administration and coordination into CONAMA. The Chilean efforts to create a legal environmental regime, along with the country's reputation for respect for the rule of law, may be enough to ensure that no competitive imbalance results between Chile and the other NAFTA countries because of enforcement problems.

Chile could become an even better NAFTA candidate by reforming its system of remedies in environmental cases. Adopting remedies such as injunctive relief, which is not available in many civil code countries, would modernize and empower the Chilean courts. The recent *Trillium* decision in Chile's Supreme Court indicates that the judiciary is increasingly willing to enforce the law even if it goes against the wishes of powerful investors.²⁸⁴ This decision also demonstrates the growing influence of environmental groups in Chile, which could act as watch dogs over the excesses of the market, alerting the proper enforcing authorities to problems.

As long as publicity and public participation are increased in potential NAFTA member countries, then NAFTA trade sanctions could be dropped. This means moving towards greater transparency in domestic legal regimes and in trade discussions, both of which are notoriously secretive. The existing NAFTA member countries would not be placed at an economic disadvantage because Chilean companies were not complying with strict environmental measures. If Chile, or any other member country, were guilty of consistent environmental violations, the other countries could simply terminate that country's membership in NAFTA based upon the competitive disadvantages resulting from industry non-compliance with established environmental norms.

As this Article has demonstrated, Chileans acknowledge the effects of industrialization and the precarious position of Chile's export-based economy dependent upon its natural resources *vis a vis* these effects. Chileans have demonstrated responsiveness and sensitivity to environmental concerns in their country and it is quite patronizing for the United States to impose

²⁸⁴ See *supra* notes 163-68 and accompanying text.

standards on a nation which has enjoyed so many political and economic successes. Chile is no environmental pariah nor a nation troubled by a history of lax enforcement of its laws. It is far better to have this country join in a *de jure* partnership with the United States on trade policy than have the United States demean the achievements of the *de facto* partnership that already exists, especially with the growing influence of a protectionist Brazil in Latin America. The sanction of expulsion, if used in conjunction with increased disclosure and public participation, would allow Chilean accession into NAFTA without enduring controversy over environmental issues and would further the multilateral efforts to liberalize the global economy with a continued push for liberalization in the Americas.

